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JUST WAR DOCTRINE: RELEVANCE AND CHALLENGES IN THE 21ST
CENTURY

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Just War Doctrine: Relevance and Challenges in the 21st Century

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ABSTRACT

For nearly two millennia just war doctrine has been central to Western understanding of justified resort to armed force, and of conduct in war. As the international system developed so the theory was first secularised and then all but rendered obsolete by a legal paradigm that sought first to establish states' rights and, later, to eliminate armed force as an instrument of international policy altogether. In the world order that has emerged after the Cold War, the legal paradigm has been found wanting. Just war doctrine is thus of renewed relevance as there remains a requirement for resort to force to be justified and for its conduct to be restrained.

Contemporary security threats and a changed value-set have made Western governments more interventionist and concern over non-state actors, mass-destructive weaponry and the threats emerging from state failure have prompted some to argue a case for preventive war. Whilst a strictly legalist approach has proved unsatisfactory, just war doctrine offers a robust framework for debate in guiding our thinking about both intervention and pre-emptive self-defence.

There are challenges to our traditional understanding of *jus in bello* presented both by Western technological dominance and by the preference for a different form of asymmetry on the part of the West's opponents. This is exacerbated by the appearance on the battlefield of a range of new actors. However, a thorough understanding of the moral principles underpinning our codes of conduct will offer a valuable – if not essential – tool not only to decision makers and commanders but to the individual fighting men and women who must make life and death decisions in the most demanding circumstances of the complex modern battlefield.

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My Supervisor, Richard Holmes, has been a wonderful source not only of advice and guidance but also of enthusiasm. His encyclopaedic knowledge has pointed me in the direction of important source material that I may otherwise have overlooked, his eye for detail has picked up my lapses in grammar and logic (though for any that remain, I alone am responsible), and his irrepressible enthusiasm for everything he undertakes has kept me focussed when my energy has flagged.

Finally, I dedicate this work to all those who have given their lives fighting justly in causes they have believed just.

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GLOSSARY OF ACRONYMS

Acronym	Meaning
AOCinC	Air Officer Commanding-in-Chief
ARBiH	Bosnian Army
BSA	Bosnian Serb Army
CAS	Close Air Support
CBRN	Chemical Biological Radiological and Nuclear (weapons)
CHS	Centre for Human Sciences
DERA	Defence Evaluation and Research Agency
DPKO	(UN) Department of Peacekeeping Operations
DUTCHBAT	Dutch Battalion (UN in Bosnia)
FCS	Future Combat Systems
HERO	Human Effectiveness Research in Operations
HRW	Human Rights Watch
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Yugoslavia
IFOR	(NATO) Implementation Force (in Bosnia)
IFPA	Institute for Foreign Policy Analysis
IHL	International Humanitarian Law
ISAF	(NATO) International Security Assistance Force (in Afghanistan)
ISME	International Symposium on Military Ethics
JSCOPE	(US) Joint Services Conference on Professional Ethics
KFOR	(NATO) Kosovo Force
LOAC	Law of Armed Conflict
NBC	Nuclear Chemical and Biological (weapons)
NEO	Non-combatant Evacuation Operation
PDD	(US) Presidential Decision Document
PLO	Palestinian Liberation Organisation
PMC	Private Military Company
PW	Prisoner of War
RAF	Royal Air Force
RMA	Revolution in Military Affairs
ROE	Rules of Engagement
RUF	Revolutionary United Front (Sierra Leone)
SFOR	(NATO) Stabilisation Force (in Bosnia)
TLAM	Tomahawk Land Attack Missile
UAR	United Arab Republic
UMAMIC	UN Assistance Mission in Cambodia
UNAMIR	UN Assistance Mission in Rwanda
UNAMSIL	UN Assistance Mission in Sierra Leone
UNFICYP	United Nations Force in Cyprus
UNGA	United Nations General Assembly
UNHCR	UN High Commissioner for Refugees
UNOSOM	UN Operation in Somalia
UNPA	UN Protected Area (Bosnia/Croatia)
UNPROFOR	UN Protection Force (in Bosnia)
UNSAS	United Nations Stand-by Arrangements System
UNSCR	United Nations Security Council Resolution
UNTAC	UN Transitional Authority in Cambodia
USAREUR	United States Army Europe
WMD	Weapons of Mass Destruction

INTRODUCTION

The author of this thesis was commissioned into the British Army at a time of relative stability and certainty in the geo-political environment; it was not a particularly attractive stability and certainty but issues of morality of conflict were, it seemed, straightforward. War was justified – indeed legal – if it were an act of self-defence (individual or collective). Moral debate, insofar as it related to defence, was largely restricted to whether nuclear weapons could ever be justified and, in particular, whether first use in pre-emption of enemy nuclear attack was acceptable. The Argentinean invasion of the Falkland Islands, while the author was a Philosophy undergraduate, was an unexpected return to a use of force that had been assumed to be a thing of the past, at least for Western nations. Nevertheless, with the exception of debate over the sinking of the *General Belgrano*, the UK's military response raised few moral questions (even in a philosophy department!)

This thesis is submitted as the author prepares to retire from the Army after nearly 27 years' service – a period that has seen massive and entirely unexpected change. Even the most unorthodox strategist would not have predicted in 1981 that the author's military service would see operational deployments to the deserts of Saudi Arabia, Kuwait and Iraq, to the Balkans, and to Afghanistan. The single monolithic threat from the Soviet Bloc has long since atrophied but the geo-political environment is anything but stable and certain, and complex moral issues loom large in the defence sphere. The changed environment has proved the neat legalist paradigm represented by the UN Charter woefully inadequate, and demands that we again engage in careful moral judgement about when and how we use force. If, as an Army-sponsored undergraduate, the author had no qualms about his nation's actions over the Falklands in 1982, he has become far more questioning since. The 1991 Gulf War seemed to him a classic case of collective self-defence against a rogue player in the international arena; thus an honourable cause in which to face risk. He was rather more ambivalent about the Kosovo campaign; certainly, Serbia's treatment of the Albanian minority in Kosovo was unattractive, but was it sufficient to overturn the international presumption against interference in the internal affairs of a sovereign state? It seemed to the author that

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there were many greater abuses ongoing that attracted no threat of Western intervention, making the humanitarian justification look shallow. A significant principle of modern international relations was to be overturned with scant debate about what should replace it. He felt no ambivalence whatsoever about either the attack on Afghanistan's Taliban regime nor about the invasion of Iraq in 2003; the first was, he judged, patently right and the second just as unambiguously wrong. His questions over Kosovo had inspired him to (successfully) apply for one of the Army's sponsored places on the Cambridge International Relations MPhil course in 2000-2001. His deep concerns over the legitimacy of the US/UK action in Iraq in 2003 motivated this current study.

The central theme of this thesis is that just war doctrine – with its origins in resolving the dilemma faced by the Roman Empire in adopting, erstwhile pacifist, Christianity as its state religion while facing military challenge – has a renewed relevance in that it gives a clear framework of understanding when addressing the complex moral issues faced today. The argument will be made that just war doctrine has appeal to all of the prevailing mainstream schools of thought in international relations theory. That it is needed, the argument will proceed, is because the legal framework for which it provided a foundation but which then almost entirely supplanted it, has been found wanting. Yet justification remains necessary at three inter-linked and inter-related levels: international, national and individual. Internationally, justification is necessary in order for a state to retain its moral authority and to be able to exercise 'soft power'; nationally, it is necessary for the government to retain its legitimacy; and, at the individual level, it is necessary for the moral well-being of those who must fight.

The argument will proceed to examine two of the key debates about *jus ad bellum* today: intervention and pre-emption/prevention and conclude that just war provides a solid framework in which to conduct the debate. Next it will examine how some of the most salient characteristics of modern conflict will challenge our understanding of *jus in bello* and, again, conclude that a deeply ingrained understanding of just war principles will provide decision makers, commanders and individual fighting men and women with invaluable guidance.

Introduction

What then does just war tell us? Unsurprisingly of a doctrine evolved over some 2000 years, there are numerous different versions even of its fundamental principles; different authors giving different weight to one or another of them, amalgamating or expanding them. This author's understanding of the doctrine is that firstly, in regard to when use of force is justified (*jus ad bellum*), it says we must have a just cause and our intentions must be right. Resort to use of force must be ordained by a proper authority. It should be a last resort, a proportionate response to the issue at hand and we must have a reasonable chance of success. Secondly, in terms of how we must constrain our conduct in war (*jus in bello*), it requires that we discriminate between combatants and the innocent, and that all actions are proportionate in terms of their military necessity versus the damage done and casualties inflicted. The 'doctrine of double effect' further refines this to say that we may take militarily necessary actions knowing that they will result in non-combatant casualties, provided that, although foreseeable, such casualties are not intentional and are, again, proportionate to the end to be achieved.

Clearly, such a doctrine is not formulaic. We cannot insert the circumstances of a particular conflict into the algorithm, turn the metaphorical handle and produce an answer of 'just' or 'unjust'. There is a deal of subjective judgement still to be made. Just war doctrine provided the philosophical underpinning for the legal paradigm that effectively determined that nothing other than self defence was a just cause. Order, in world affairs, was paramount; hence, the UN Charter prohibits any interference in the internal affairs of other states. Yet contemporary debate about humanitarian intervention shows that so simplistic an interpretation is inadequate. It sufficed so long as our value-set privileged – as the UN Charter paradigm does – order above all else. Yet the outcome of the UN Summit of 2005¹ provides definitive evidence that this value-set no longer holds. Now individual human rights are seen as having a higher value. Whereas once we argued there could be neither peace nor security nor justice without order, now we argue the opposite.²

The complexities of modern conflict challenge, too, our traditional understanding or *jus in bello*. The Western approach to war, with a heavy emphasis on leveraging technology to minimise our own casualties risks lacking the discrimination and

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proportionality that just war demands; moreover it seeks, increasingly, to remove the soldier from the battlefield – and in so doing removes the agent for moral choice and compassion. Our enemies also seek advantage through asymmetry, with a preference for attacking the weak and vulnerable. And the appearance on the battlefield of a range of new actors further complicates things for the individual soldier. All this demands that we again examine our moral understanding of conduct in war; complexity requires that astute moral judgement be as much a part of a soldier's instinct as his reaction to effective enemy fire.

The approach taken in this thesis is consciously interdisciplinary, reflecting the author's academic and professional background. Thus, it involves analysis from international relations theory and political philosophy, illustrated with examples from military history and international law, but the whole tempered by the practical experience of 26 years in military uniform. The author's views have been coloured, challenged, supported and shaped by discussions, debate with, and observation of superiors, colleagues and subordinates from both the British Army and its allies, especially the US with whom he has served and interacted significantly.

It is the author's contention and firm belief that a solid understanding of just war doctrine will provide senior policy framers and decision makers with a framework of understanding that will help them through the moral minefield of decisions on proper use of force in the complex environment of today. Just war doctrine is neither simple nor, as has already been stated, formulaic; it will not provide the answers to each and every set of circumstances but it will firmly guide the debate to the crucial issues. Secondly, just war principles can serve as a guide to individual fighting men and women. It is earnestly hoped, therefore, that this thesis might be a starting point for those who wish – indeed need – to develop a much deeper understanding than hitherto of the moral issues that surround our use of force today.

¹ UN Summit 2005. Documents on-line at <http://www.un.org/summit2005/documents.html>.

² Kofi Annan, *In Larger Freedom: Towards Development, Security And Human Rights For All*. Report of the UN Secretary General to the World Summit 14-16 Sep 2005. Online at http://www.un.org/ga/59/hl60_plenarymeeting.html.

CHAPTER 1: JUST WAR IN CONTEXT

1.1 Conceptual Framework

Just war doctrine, as traditionally understood, is fundamentally an ethical thesis, seeking to impose moral restriction on when armed force may be used as an instrument of international relations, and on how such armed force may legitimately be employed. Proper consideration of the role this doctrine can usefully play in the moral calculus of 21st century armed conflict, requires that we first establish that there is indeed a role for ethical judgement to play in determining the occasions for and the conduct of warfare. This does not require a precise definition of war or conflict, which are many and varied. SIPRI, for example, defines a major armed conflict as ‘the use of armed force between two or more organized armed groups, resulting in the battle-related deaths of at least 1000 people in any single calendar year and in which the incompatibility concerns control of government, territory or communal identity.’¹ This is useful when collecting statistics and needing to know what is to be included in the analysis but such precision and consistency is unneeded in this thesis. The concern here is to establish the relevance of an ethical doctrine to the regulation of a state’s* use of armed force; the size and scope of that use of force is immaterial to the argument of whether it ought or ought not to be subject to moral regulation.

It is also useful to acknowledge from the outset that although views may differ on how the boundaries of the legal, moral, and political realms are set, few could argue that these boundaries are anything other than blurred. For as the celebrated international lawyer Hersch Lauterpacht reminds us: ‘If international law is, in some ways, at the vanishing-point of law, the law of war is, perhaps even more conspicuously, at the vanishing-point of international law.’² Lawrence Freedman, too, has pointed out that when we talk of decisions by the UN Security Council as the arbiter of an action’s legality, we are not talking of a judicial process but a political one.³ The degree to which such political decisions are at the same time moral ones, or at least to some extent informed or guided by ethical considerations, is very much an issue for this chapter.

* And, which we shall see later, must be extended to non-state actors.

This chapter will seek, then, to place just war doctrine in a conceptual framework that acknowledges alternative views of the role of ethics in the calculus of international relations, and war as their most intense form. Various models have been offered by theorists and it has become commonplace to contrast just war with realism on the one hand, which in its starkest form sees war as amoral – beyond the scope of ethical considerations; and with pacifism on the other, which sees warfare as immoral.⁴ This study will break somewhat from this and consider just war in relation to the three broad schools of International Relations thought that can most readily be argued to still have influence over Western nations. It will stick to the script in considering realism but then, rather than contrasting with pacifism, will instead use as a foil liberalism/liberal internationalism. This approach will contrast a school of thought that, certainly at one end of its broad spectrum of thinking, regards war as lying outside the realm of ethics, with one that stands fundamentally in opposition to realism in its view of mankind and of international relations. It can be seen to encompass pacifism but arguments will also be advanced that liberal internationalists are more rather than less prone than realists to resort to armed conflict. The third stream considered will be the so-called English School or International Society. In broad terms these three may be equated to what Martin Wight characterises as Realism, Revolutionism and Rationalism.^{*5}

1.1.1 Realism

Realism, at least in its starkest manifestation rejects entirely the application of morality to warfare, as indeed it does to international relations in general. The archetypical realist, explains Coates⁶, holds not only the ‘conviction that the reality in question is morally intractable,’ but that ‘the very attempt to impose a moral solution has tragic consequences.’ Machiavelli, with whom the realist tradition is closely identified, warned that

the gulf between how one should live and how one does live is so wide that a man who neglects what is actually done for what should be done learns the way

^{*} Where Wight’s taxonomy is quite useful is in bringing together such widely diverse traditions as Kant’s concept of Enlightenment and the ‘Perpetual Peace’, Communism, and the liberal internationalism of Woodrow Wilson. What links them is a passionate belief in the moral unity of mankind.

to self-destruction rather than self-preservation. The fact is that a man who wants to act virtuously in every way necessarily comes to grief among so many who are not virtuous.⁷

If this is true of the domestic political arena, then it is much the more so, realists argue, in the arena of international affairs and, most particularly, in the field of armed conflict.

Although International Relations as a recognised discipline has only existed since about the middle of the 20th Century, realism, both as a theory of International Relations and, more specifically, as a reaction to war, draws on an intellectual tradition that can be traced to classical times. Thucydides, in his dramatisation of a dialogue between generals of Athens and the ‘commissioners’ of Melos offers a definitive view. Melos was a colony of Lacedaemon (Sparta) but had sought to remain neutral in the conflict between its suzerain and Athens. When the Athenians nevertheless invaded, the Melian commissioners met with the Athenian leadership to plead the justice of their case to be left in peace. The Athenian response, though there follows a lengthy dialogue, is summarised by one of the opening statements:

...we shall not trouble you with specious pretences – either of how we have a right to our empire because we overthrew the Mede, or are now attacking you because of wrong that you have done us – and make a long speech which would not be believedsince you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.⁸

Thomas Hobbes (noteworthy also as the first translator of Thucydides into English) offers a similar amoral view of war, based on his theory of man and state. Hobbes’ hypothetical state of nature, predating any form of government, is one of all in conflict with all as each man not only values his own liberty but seeks dominion over others. In this state

..there is no place for industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of commodities that may be imported by Sea;; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; and the life of man, solitary, poore, nasty, brutish, & short.⁹

It is to escape this state that men choose to join together in communities, each submitting to a central authority. Relations between states, for Hobbes, are in a

similarly anarchic ‘state of nature’. Although he does not address the issue in terms, we can infer that whereas the threats to man from such a condition existing between individuals are such that he can clearly see his interests are best served by forgoing a degree of autonomy in return for the greater security of society, the analogous position for states is not such that they judge the threat sufficiently great and they prefer, therefore, to remain in the ‘state of nature.’

Hobbes thus presents two of the key characteristics of realism: a pessimistic view of the nature of man, and an international system (or more correctly lack thereof) which is fundamentally anarchic. In considering Hobbes’ assertions it is interesting to note that in times of crisis, throughout the history of conflict, when states have felt sufficiently threatened they have been prepared to forego quite considerable degrees of sovereignty in the interests of collective security. NATO’s formation in 1949 offers a particularly vivid example of this. But it must be conceded that when threat recedes so the primacy of national sovereignty is quickly reasserted.

Also of interest in Hobbes is his view of how the ‘covenant’ by which the community is formed (hypothetically, not by any real historical event), can only survive so long as there is a central authority with a monopoly of *power* to enforce it. ‘Covenants without the sword, are but words.’¹⁰ This clearly has an impact on relations between states: there is no higher authority, no power of enforcement and hence no validity to international covenants (except in so far as individual states can enforce them). Discussion of the development of just war doctrine later will revert to this issue as it is echoed in the words of Grotius: ‘*ubi jus ibi remedium*’ (there is no right without a remedy)¹¹ and it is, of course, a frequent criticism of the UN system. Hobbes says nothing about the right of states to go to war, but it is simple to deduce from *Leviathan* that he would not see the relevance of the question. He does not address the issue of states’ relations with each other except to perceive them as in a permanent state of war (actual or potential) because they are in the state of nature with regard to one another. Going to war is not a matter of right, but of fact: it is the natural state of things.

In continental Europe, slightly ahead of Hobbes, a doctrine was developing which was to remain central to the realist view: that of *raison d'état*. As the medieval concept of universality – one God in Heaven, one emperor on earth – which all but came to pass in the form of the Holy Roman Empire, was undermined by the reformation, ‘the emerging states of Europe needed’ argues Kissinger¹², ‘some principle to justify their heresy and to regulate their relations.’ That principle, of which unarguably the chief architect was French First Minister Cardinal Richelieu,

..asserted that the well being of the state justified whatever means were employed to further it; the national interest supplanted the medieval notion of a universal morality. The balance of power replaced the nostalgia for universal monarchy with the consolation that each state, in pursuing its own selfish interests, would somehow contribute to the safety and progress of all the others.¹³

Thus, and with the conclusion of the Thirty Years War and the Peace of Westphalia, developed the European states system and its balance of power politics that, despite being seriously challenged and briefly shattered by French revolutionism at the end of the 18th Century, remained the dominant feature of international politics until the First World War. Pitt, Metternich, Andrassy and Bismarck all played the game by essentially the same rules. Whether we call it *raison d'état*, as Richelieu would, or *realpolitik* with Bismarck, we are talking of the (self-) interests of the nation state as the prime (some would argue only) motivating factor in states’ interaction with one another. Realists argue that so long as all play by these rules, and the balance of power is maintained through the forming and reforming of alliances and sometimes by the judicious and timely use of force, the greater good is served. The contemporary importance of this school of thought is highlighted by David Welch¹⁴: ‘It caught on in the interwar period in the United States, where it has enjoyed a hegemony of sorts ever since. It is difficult to find two consecutive pages of prominent journals such as *Foreign Affairs*, *Foreign Policy*, and – of course – *The National Interest* on which the term does not appear.’

Welch goes on to argue, however, against the utility of this. For ‘both as an analytical tool and as a guide to foreign policy making, the term *national interest* is useless. In fact it does positive harm.’¹⁵ The term, argues Welch, gives nothing by way of foreign policy guidance as it is rare for any situation to offer just two conflicting options, one in the interest of the state and the other not. Opinions, nationally, are rarely if ever other

than divided and no one party can claim a monopoly on 'the national interest'. *Whose* interests are really being served is too readily disguised. Moreover, it is invariably the case that a situation that threatens values that a state holds dear, at one and the same time offers important opportunities for the promotion of others. This is but one problem with the central tenets of realism.

In the 20th Century, as International Relations began to develop formally as an area of study, so realism, as one of its mainstream schools of thought, developed largely as an antithesis to the liberalism that predominated after the wholesale slaughter of the First World War. One of its great classic works, E H Carr's *The Twenty Year Crisis*, is exactly that: a reaction to and critique of the failure of what Carr sees as the misguided liberalism of the League of Nations era. Even Carr's choice of the term 'Utopian' to describe the liberal school underlines its idealistic but impractical agenda, contrasted with the pragmatic 'reality' of the alternative he offers. Fundamental, for Carr, is an understanding that the moral obligations of states, as of other what he terms 'group persons', is that those obligations are more limited by self-interest than those of individuals.¹⁶ Indeed it is

not merely true that the ordinary man does not demand from the group person certain kinds of moral behaviour which are demanded from the individual; he expects from the group person certain kinds of behaviour which he would definitely regard as immoral in the individual. The group is not only exempt from some of the moral obligations of the individual, but is definitely associated with pugnacity and self-assertion, which become positive virtues of the group person.¹⁷

What Carr appears to be saying here is that the morality of states is different from that of individuals because the first duty of states is inward looking, not outward. A state, whilst it might be admired for the generosity of its overseas aid funding, for example, is not expected to expand this to the point of detriment to the living standards of its own population. On this point, alone, the case is unconvincing; individuals, too, might be admired for charitable giving (indeed, like a state, admiration, standing and influence might be among the less than altruistic motives), but they are not expected to reduce (significantly) their families' standard of living in the interests of others.

Carr, of course, has more to say. With a certain, whether intentional or not, echo of Hobbes, Carr contrasts individuals' coming together into societies with the condition of states. He dismisses the idea that a community of states exists as anything but a hypothetical tool. Such a construct exists because, and only because, 'people talk, and within certain limits behave, as if there were a world community.'¹⁸ And yet 'it would be a dangerous illusion to suppose that this hypothetical world community possesses the unity and coherence of communities of more limited size up to and including the state.'

There are, argues Carr, two principal differences. Firstly, the principle of equality, which is widely accepted within states, is neither generally applied nor easily applicable to the 'international community.' If we need an example of that we have to look no further than the UN Charter, which privileges five states above all others as permanent members of its critical executive committee and grants those five a veto over the decisions of that committee. Or we can consider the insistence of the nuclear possessor states that no further states should join their club. Secondly, the general principle within societies that the good of the whole takes precedence over the good of the constituent parts (arguably itself increasingly challenged today) is certainly not widely accepted as applying to the 'world community.' We can take as examples the United States' decision to renege on its Kyoto protocol obligations, or the insistence of Iceland in rejecting worldwide whaling bans. 'Loyalty to a world community is not yet powerful enough' Carr notes 'to create an international morality which will override vital national interest.'¹⁹

Carr is dismissive of 'Utopian' claims of moral universalism. There is a tendency, he argues, for any doctrine of natural harmony of interests simply to identify the values of the possessor with those of the world at large. He sees little difference in principle between Woodrow Wilson's declaration that American principles were the principles of the world, Toynbee's assertion that the security of the British Empire was 'the supreme interest of the whole world,'²⁰ or, indeed, Hitler's identification of the interests of the whole with the interests of the fittest – 'the bearers of a higher ethic.'²¹ Doubtless Carr would recognise exactly the same tendency in Tony Blair's address to the US Congress:

There is a myth. That though we love freedom, others don't, that our attachment to freedom is a product of our culture. That freedom, democracy, human rights, the rule of law are American values or Western values.....

Ours are not Western values. They are the universal values of the human spirit and anywhere, anytime, ordinary people are given the choice to choose, the choice is the same. Freedom not tyranny. Democracy not dictatorship. The rule of law not the rule of the secret police.²²

The final issue of interest here that Carr addresses, again with echoes of Hobbes, is the relationship between individual interests and power. In national communities sacrifices of self-interest are made for the common good but some degree of 'power' is required to ensure this; much 'self sacrifice' is made only in the sense of giving voluntarily what would otherwise be taken by force. 'Harmony in the national order is achieved by this blend of morality and power.'²³ But in the international order there is a different balance in which power plays a much greater role, hence 'any international moral order must rest on some hegemony of power.'²⁴ Critics of the UN might point to just this issue: an absence of power resulting from a lack, or inadequacy, of enforcement mechanism*. Carr does note, however, that in this hegemony of power, there must be some give and take – helping maintain the hegemony by minimising challenges to it. In this, perhaps, there is a stronger argument for just war than for realism: if a hegemon uses its power as the true realist would urge, without any consideration for *jus ad bellum*, the grudging acceptance of others may turn to resentment and lead to challenges.

So, chief among Carr's criticism of the flawed understanding of those who had attempted to establish peace through the mechanism of the League of Nations was their misguided belief that the world shared a common value set upon which such institutions could be built. Without such a shared value set attempting to build stability based on institutions and legislation, aping that of national societies, is bound to fail. And without such institutions the anarchy of the international system must continue; anarchy hemmed in and controlled only by power.

* This issue is discussed in greater depth in Chapter 2.

How then, does this realist view of international relations impact on the approach to war? To the orthodox realist, argues Nicholas Fotion²⁵, war must be regarded as ‘non-moral.’* He ascribes two claims to what he terms ‘full blooded realists’: firstly that because, as Hobbes insisted, nations exist in a state of nature with regard to one another,

there are no significant moral relationships between nations the way there are between people who live in a society. Thus, when a nation is considering going to war with another nation, it does not have to consult moral reasons that take the other nation into account. Even if it starts an aggressive war it does no moral wrong.²⁶

However, realists would be guided by the interests of the state; wars are costly and dangerous endeavours, not to be undertaken lightly. By contrast, utopians, to use Carr’s term, are seen by realists as placing at risk ‘the fragile construct in which an imperfect peace (the only peace on offer) is seen to consist. Their ostensibly (and always ostentatiously) ‘moral’ and ‘pacific’ interventions are thought to increase the likelihood both of war’s occurrence and of its greater intensity and longer duration when it occurs.’²⁷ Colin Gray develops this line of argument in attacking the ‘Moralpolitik’ of Britain’s New Labour foreign policy:

In outraged pride, or hubris, lurks the serious peril of nemesis by ambition. If Moralpolitik, for all its inappropriateness, translates strictly into policy urges to discipline and re-educate all but the most helpless among the world’s failing polities, the course of events still may offer some unpleasant surprises; but the hubris of ‘nation and state building’ is pregnant with more dangerous possibilities.

..... the puffed up pride in moral judgement which produced the hubris which embroiled us foolishly in the Balkans in 1992 may yet seduce us into much more perilous interventions^{28†}

Realists, recognising the ‘fragility of the construct,’ are loathe to wage war unless national interest is genuinely threatened and, following Clausewitz, recognise that no war should be entered into without a clear understanding of what is to be achieved thereby.

* He distinguishes this from ‘amoral’, which is usually taken to mean lacking a sense of right and wrong; realists lack no such sense, but argue that war is not subject to moral judgements.

† His words now appear remarkably prescient. However, he was rather less so in the accompanying footnote which suggested there was “much less danger of this happening now that the White House is occupied by George W Bush.”!

The reason war fought at ‘utopian’ behest is more likely, according to realists, to be longer lasting, is because, having gone to war in moral cause, the utopian is logically precluded from settling for any pragmatic conclusion that fails to do justice to the moral principles in whose name the conflict was entered into. One might consider, in this regard, the rejection of the Vance-Owen peace plan for the Balkans, on the grounds that in accepting, arguably, the reality of the situation, it appeared to reward Serb aggression.

The second claim that Fotion ascribes to realists is that once war starts, then again there can be no recourse to moral consideration; what matters is winning and no holds are barred. By way of example he cites Genghis Khan: ‘The greatest joy a man can have is victory: to conquer one’s enemies’ armies, to pursue them, to deprive them of their possessions, to reduce their families to tears, to ride on their horses, and to make love to their wives and daughters.’²⁹ Lest we wish to disregard this as a non-European attitude to war, there is this passage in Shakespeare’s *Henry V*, reflecting at least an Elizabethan view, if not that of the age of ‘chivalry’ itself:

For as I am a soldier// If I begin the batt’ry once again/ I will not leave the half-achieved Harfleur/ Till in her ashes she lie buried./ The gate of mercy shall be all shut up,/ And the fleshed soldier, rough and hard of heart,/ In liberty of bloody hand shall range/ With conscience wide as hell, mowing like grass/ Your fresh fair virgins and your flow’ring infants.// What is it to me, when you yourselves are cause, /If your pure maidens fall into the hand/ Of hot and forcing violation// ...In a moment look to see/ the blind and bloody soldier with foul hand/ Defile the locks of your shrill shrieking daughters;/ Your fathers taken by the silver beards/ And their most reverend heads dashed to the walls;/ Your naked infants spitted upon pikes,/....³⁰

And more modern history, too, is replete with this view that whatever moderation is considered in determining when and whether to go to war, once war is engaged upon then it is a bloody and beastly business in which soldiers have not the leisure to reflect on right and wrong, even if they felt obliged so to do. Coates, in this regard, holds up the example of Sir Arthur ‘Bomber’ Harris, AOCinC Bomber Command, and the chief architect of the strategy of bombing German cities to force German capitulation in the Second World War, citing the Air Marshal thus: ‘There was nothing to be ashamed of, except in the sense that everybody might be ashamed of the sort of thing that has to be done in every war, as of war itself.’³¹

Realists thus reject the Augustinian precept that war must be fought with compassion and without hatred; rather, they argue, military training is geared to turning men into killing machines; fighting with compassion is impossible.

This is the easiest part of the realist thesis to disavow, for as many examples as there might be of abject brutality in war, there are at least as many that show that ordinary soldiers continue to act as moral agents, with acts of the utmost humanity mingled with the barbarity of their situation. That soldiers cannot pause to question or to consider the morality of each and every decision on the battlefield does not argue against such moral consideration coming into play. Rather it argues for such moral judgement to be second nature: a crystal clear conception of what is right and wrong in war, having been comprehensively imbued in every soldier in training and throughout his or her career; in short, part of his ethos. This will be examined further, in Chapter 4, when considering some challenges to that claim in respect of 21st Century warfare.

To conclude this survey of realism let us consider two final thoughts: that there are degrees of realism, and that realism is not necessarily non-/amoral. Like any broad school of thought, realism, as a label, is used to cover a range of views. It is, says Fotion³² ‘a highly variable position that one way or another rejects or diminishes the role of ethics in war. In its extreme form, what it says is that anything is fair when it comes to war, which is a roundabout way of saying that fairness (justice) and war have nothing to do with one another.’ But not all realists take this extreme view. Whilst all will talk, in some form, about it being the duty of states to act in self-interest, it is not at all clear that all, or even most, mean that this should be the exclusive motivation of the nation-state. It has already been argued that realists must seek to avoid war if at all possible – because war, per se, can rarely be in a state’s interest. So perhaps, at one end of the scale, at least, we can find in ‘practical’ realists some accommodation with just war principles. Moreover, even for those who insist that entering into war is purely a matter for realist determination, there can be few, today, who would seriously espouse the bloodlust of Sherman (or even Harris) in the conduct of war. So, even if we adopt a realist outlook, there is a need to consider a proper basis for determining what is

acceptable and what not in the conduct of war. And, intuitively, one feels, this is bound to have a normative rather than purely pragmatic feel to it.

Finally, in insisting states should do what is necessary, realists are not necessarily arguing against a role for ethics in war, or in international relations more widely. They are arguing that the role of the state is the protection, and advancement of the interests, of its citizens. Acting in the 'national interest', then, is not a matter of selfish immorality, but one of duty, of obligation. Welch's rejection of 'national interest' as a useful term because of its lack of either authoritative meaning, or unambiguous foreign policy guidance, was discussed above. However, the sense of the term is clear; the realist argues that the first and foremost duty of the state is to its own. Such a view does not deny normative value to fulfilment of that duty. A central line of realist thought, though, even for realists who do not entirely deny ethics a role in foreign policy deliberations, is that the moral spheres of the individual and the state are clearly distinct. Coates offers a thought that usefully concludes this section: 'Dualism can be avoided by recognizing that even in private life moral action is complex and conflictual, and that an individual may be required to sacrifice one value for the sake of another.'³³

1.1.2 Liberalism.

There are a variety of labels that have been used to describe the tradition that is to be used here as a foil to realism. As we have seen, Carr, in a consciously judgemental manner terms it 'utopianism'. 'Idealism', too, is widely used. This thesis will stick with perhaps the commonest terminology, whilst readily acknowledging that this is a broad school with many equally valid interpretations and understandings. Also striking is Martin Wight's characterization of it, already mentioned, as 'Revolutionism,' for a common linking thread of liberal agendas throughout history has been a desire to overturn the established order. Just as Kant's 'Perpetual Peace' was a rejection of the perceived wisdom of the Eighteenth Century that war and power struggle were the norm, so Woodrow Wilson's liberal internationalism was an overt rejection of the imperial power struggles and secret diplomacy that had led to the First World War. Wight defines revolutionists (also sometimes styled 'Kantians') as:

those who believe so passionately in the moral unity of the society of states or international society, that they identify themselves with it, and therefore they both claim to speak in the name of this unity, and experience an overriding obligation to give effect to it, as the first aim of their international policies; they are cosmopolitan rather than internationalist, and their international theory and policy has a missionary character.³⁴

In his analysis of Wight, Hedley Bull³⁵ draws attention to three distinct groups included in Wight's characterisation: the religious revolutionists of the Sixteenth and Seventeenth Centuries (both protestant reformers, and Catholic anti-reformers); the French revolutionists of the 18th Century and the respondent 'international legitimacy' represented in the Congress of Vienna; and the totalitarian revolutionists of the Twentieth Century, together with their opposites, the counter revolutionists exemplified by Dullesian anti-communism. Further discussion of Wight will be left until the next section, and for now we will remain with the more traditional understanding of liberalism.

If we accept Hobbes, albeit with more than a backward glance to Thucydides, as the father of modern realism, then for liberalism the analogous place is occupied by John Locke. Even here, of course, there must be acknowledgment of earlier influences. Indeed, Barker³⁶ dubs St Thomas Aquinas 'the first whig.' For Aquinas draws a distinction between three aspects of authority: its *principium*, ordained by God; its *modus* or 'constitutional form', determined by the people; and its *exercitum*, conferred by – and hence also, when necessary, to be withdrawn by – the people. This line of thought, and his development particularly of the third aspect – that it is the community that institutes government and therefore the community may restrain or revoke its authority – was clearly influential on Locke. The principle that a government owes its position to the people ('of all the people, by all the people, for all the people,' as Theodore Parker and then, more famously, Abraham Lincoln were later to have it)³⁷ is pervasive throughout Locke's political philosophy and the liberal tradition that ensued, and has returned to the fore of political debate as a principal justification for external intervention in the internal affairs of oppressive states.

Locke's view of 'man in the state of nature' is not radically different from that of Hobbes but he puts a different interpretation on it, drawing a consequently different conclusion as to the remedy. For Locke the emphasis is on the freedom man enjoys in the state of nature, but:

...though this be a state of liberty, yet it is not a state of licence: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions...³⁸

An important difference between Hobbes and Locke, of course, is the latter's Christianity. Man is 'sent into the world by his order ...(and) made to last during his and not another's pleasure.' Thus it is God who has 'appointed government to restrain the partiality and violence of men' (following Aquinas' view of the *principium* of authority) and 'civil government is the proper remedy for the inconveniences of the state of nature.'³⁹ Unlike Hobbes, Locke does not see that civil government must be vested in an all-powerful, authoritarian 'Leviathan'. For:

..it is evident that absolute monarchy, which by some men is counted for the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all. For the end of civil society being to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man's being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise, and which everyone of the society ought to obey.⁴⁰

Locke's concern is with civil (domestic) government. He says little about how relations between states ought to be organised, though he does talk of conquest and the rights and duties of conqueror and vanquished (in largely just war terms). That he envisaged no international society is evident in that when he seeks an example of the 'state of nature' it is to states than he turns: '.. since all princes and rulers of *independent* governments all through the world, are in a state of nature, 'tis plain the world never was, nor never will be, without numbers of men in that state.'⁴¹ What Locke does give us clearly, though, is an insight into the liberal view of man: he is rational and progressive, seeking cooperation with his fellows to advance his own, as well as the common, good.

If it is Locke who lays the grounding of liberal political thought at a national level, then it is Kant who seeks to internationalize it. Kant's philosophy can only be fully understood as a whole: there is a remarkable consistency between his epistemological, ethical and political thought. Here, though, it is only necessary to highlight one or two principal themes that lay the foundations for his views on international relations. First and foremost, what differentiates Kant from most other thinkers of his time and previously is that they base their moral philosophy by appeal either to a greater authority – most usually God – or to the satisfying of man's desires. By contrast, Kant looks to reason, argues Humphrey⁴², 'as the focal point of an autonomy enjoyed by man and other free rational beings; and autonomy is just the ability to be self-guiding.' Two key building blocks for Kant's moral and political philosophy, both recurrent themes in liberal thinking, are man's rationality and a belief in his capacity for progress. Thus man is both morally responsible for his actions, and able to learn, develop and improve upon the way he acts. To be so man must be both free and rational. This stands in stark contrast to the very deterministic outlook prevalent among neo- (or structural-) realists who argue that states (which – and not individuals – are the units of interaction) are bound to act in certain ways as dictated by the international system in which they exist; as such (and bearing in mind the old ethicists' adage that 'ought implies can') ethics has nothing to do with the case. Not so for Kant who holds, rather, that history is the process of man's moral growth.⁴³ Thus:

This portrayal of mankind's earliest history reveals that its exit from that paradise that reason represents as the first dwelling place of its species was nothing but the transition from the raw state of a merely animal creature to humanity, from the harness of the instincts to the guidance of reason – in a word, from the guardianship of nature to the state of freedom.⁴⁴

Now that man is exercising free rationality rather than animal nature, he no longer merely meets his needs instinctively. Rather he seeks to satisfy desires, which must be ordered and prioritised. There is now a conflict of interest to be addressed between his own needs and those of others. His choices are not made in isolation because, to avoid the perils of a Hobbesian state of nature, he has rationally opted to live in a society.

This is the context against which Kant considers the relations between nations. Kant considers that society is not just necessary between men, but also between states,

because individuals – whether men or states – cannot meet all their needs alone. This association brings with it competing needs and hence conflict. Far from diminishing those existing needs, the conflict exacerbates them. Thus is created a dialectic, which must be resolved not by simple expedient compromises but by establishing a genuine accommodation. This takes the form of recognizing that all parties enjoy certain rights ‘because they, like oneself, are ends in themselves, who cannot rightfully be used as means to one’s own ends.’⁴⁵ This is, for Kant, as applicable to states as it is to individual men.

Individuals recognize that their rights are best served, in totality, through the voluntary limiting of those rights that is implicit in binding together in societies, through a ‘social contract.’ Only after the foundation of a universal cosmopolitan state can man’s rights be optimised. Kant does not underestimate the difficulty of this; individuals within a state have to submit to an authority which can enforce the law and the same will be necessary to maintain a society of states. Not only does Kant recognize the difficulty of this – because states are even more jealous of their sovereignty than are individuals – but he recognizes the dangers, too, in seeking to construct this ultimate authority – which, all too easily, could result in despotism.

In the first section of his definitive work *To Perpetual Peace* Kant lays down the practical rules, by following which peace among nations is to be maintained. It includes such portents of the UN Charter as that ‘No nation shall forcibly interfere with the constitution and government of another.’ Whilst in the case of civil war an external power’s siding with one party

could not be regarded as interference by the other in its constitution. So long, however, as this internal conflict remains undecided, a foreign power’s interference would violate the rights of an independent people struggling with its internal ills. Doing this would be an obvious offense (sic) and would render the autonomy of every nation insecure.⁴⁶

It is interesting to note, therefore, though perhaps more a reflection of the geopolitical situation of the time than an underlying philosophy, that in this foundation-laying work of liberal internationalism, there is no notion of ‘humanitarian intervention’ or ‘rescue’.

Kant also provides some practical guidance on what is and what is not permissible in the conduct of wars that do, nevertheless, occur. It is particularly important that no acts should occur that render impossible the mutual trust upon which any future peace settlement must rest. Amongst such ‘dishonourable stratagems’ Kant lists the use of poisoners and assassins, breaching the terms of any surrender, and ‘instigating treason in the opposing nation.’ Some level of trust must be maintained between belligerents or else no peace treaty will be negotiable – because neither side will trust the other to honour its provisions. War would then, of necessity, become one of extermination. This must be avoided because, Kant accepts, in the absence of any higher authority who could resolve disputes between states, some conflict between them is inevitable. This acceptance that war is inevitable in the absence of higher authority, echoes, as we shall see later, Aquinas’s view that war was permissible only because there was no higher authority who can adjudicate disputes and with the power necessary to enforce its judgement. Kant expands further on this in Section 2 – the Definitive Articles: ‘The state of peace among men living in close proximity is not the natural state; instead, the natural state is a one of war, which does not just consist in open hostilities, but also in the constant and enduring threat of them.’⁴⁷

So how is this natural state to be overcome? In his ‘Definitive Articles’ Kant sets out the necessary conditions, amongst which the first two are key: every nation must have a civil constitution that is ‘republican’; and there must be a federation of free states. The reasoning behind the first of these is simple: the idea that a republican constitution is the most natural one flows from the ideas of contract and freedom that have gone before, from the concept of equality for all, and of a single source of legislative authority. Such constitutions will necessarily result in peace because the consent of the people would be required to make war, and the people will always prefer to avoid war.* The people will wish to avoid war because they will consider

all its calamities (Among these are doing the fighting themselves, paying the costs of war from their own resources, having to repair at great sacrifice the war’s devastation, and, finally, the ultimate evil that would make peace itself bitter, never being able – because of new and constant wars – to expunge the burden of debt).⁴⁸

* This is a similar construct to that of the thesis of the democratic peace, often advanced today, which will be discussed further in Chapter 2 and Chapter 4.

Kant argues that in states with non-republican constitutions, by contrast, rulers can declare war without concern for the adverse effects from which they, personally, will be protected.

Although it is easy to accept the broad thrust of Kant's argument at face value, on reflection it is less convincing. Absolute rulers, who count everything in a country, including its population, amongst their chattels, are indeed taking great risk with their 'property' in engaging in war, and historically have often put themselves at the forefront of the fighting. Whether or not their lives are at risk they are taking a serious gamble on their position; catastrophic defeat may see them, at very least, toppled from power. And it might be possible to attack the other side of the coin as well; in a democracy, today, it can be public clamour that 'something must be done' that results in the use of force when the government may have preferred otherwise. Alternatively, in 2003, we saw the democratic government of the UK engaging in military action despite significant indications of very sizeable minority opposition, and a majority of the population displaying, at least, serious misgivings.

Kant's argument for a federation of states, is a practical compromise because he accepts that the ideal 'one nation of peoples that will finally include all the peoples of the world' is, for the time being, a step too far. Yet states living in close proximity – in the manner of individuals – each constrain the liberties of the others so there must be some contracting together as a society (just as with individuals). A 'nation of nations' is not the answer because each would continue to vie for its rights. Here he refers to the work of the early international lawyers, Grotius, Pufendorf and Vattel. Lacking any real force of law, because there are no external constraints on states, their codes are used merely to vindicate war: 'always piously cited in justification of a war of aggression no example can be given of a nation having foregone its intention of going to war based on the arguments provided by such important men.'⁴⁹ Until such time as there is one nation of all men, then, the compromise must be a federation of states, all guaranteeing the security and freedom of the others – but not some form of union – or 'nation' – that requires that they surrender their sovereignty.

The hopeful aspiration for an everlasting peace, echoing Kant's 'Perpetual Peace', can be identified readily in the triumphal optimism that seems always to follow a period of major conflict. Even the Congress of Vienna, following Napoleon's first exile, and in many respects an ultimate example of 'balance of power' politics, is not without a flavour of moral progress. For, as Kissinger⁵⁰ puts it, the continental allies had learned a vital lesson:

Power is too difficult to assess, and the willingness to vindicate it too various, to permit treating it as a reliable guide to international order. Equilibrium works best if it is buttressed by an agreement on common values. The balance of power inhibits the **capacity** to overthrow the international order; agreement on shared values inhibits the **desire** to overthrow the international order.

The success of the Congress of Vienna and the order it established lay in its recognition of this twin requirement not only to balance the powers but to establish a sense of shared values and also, as the victors in 1945 but not those of 1918 were to realise, to offer a degree of magnanimity to the losers. The moral element was all the more explicit in Czar Alexander's accompanying 'Holy Alliance', proposing 'the course formerly adopted by the Powers in their mutual relations had to be fundamentally changed and that it was urgent to replace it with an order of things based on exalted truths of the eternal religion of our Saviour.'⁵¹

However, it is in the aftermath of the terrible destruction of the First World War that liberal optimism reaches its zenith. As Michael Howard⁵² says:

In 1918 the Enlightenment liberals had, to all appearances, finally triumphed. The conservative order represented by the ruling dynasties ... had disappeared overnight. ... The United States, now the most powerful nation in the world, was liberal democracy incarnate, and its leader, President Woodrow Wilson, had a clear perception of the new world order he intended to introduce, together with the power to impose it.

Above all he believed in the creation of a league of nations who would mutually guarantee each other's security; one bound together not just by unwritten understandings based on perceptions of common interest like the old Concert of Europe, but by firm legal covenants: a vision sketched out by Kant ... that had become a central aspiration for the peace movements of the nineteenth century.

Championed by Wilson, and proposed by him as early as 1916⁵³, the League of Nations sought to establish the mechanisms of collective consultation and arbitration that, it was

believed, would negate the need to resort to war. If its hopes were dashed, then the same triumphal optimism can be seen in the wording of the UN Charter nearly three decades later (though it will be argued later that despite its universalist rhetoric, the UN Charter was very much a realist construct):

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours.....⁵⁴

The same can be said of much of the rhetoric surrounding President George Bush (Snr)'s declaration of a New World Order⁵⁵ at the end of the Cold War; and Francis Fukayama's famous, if now obviously premature, declaration of the 'end of history'.⁵⁶

We shall conclude this survey of liberalism with a brief description of the liberal response to post-World War Two neo-realism, a highly deterministic form of realism in which states are seen as programmed into their responses to events by the international system in which they find themselves. The response is commonly referred to as neo- or institutional-liberalism and counts amongst its leading proponents Joseph Nye and Robert Keohane.

Neorealism has accepted that, notwithstanding international anarchy – in the sense of the absence of a common government – there is, nevertheless, a structure to international relations. In Kenneth Waltz's words: 'World politics, although not formally organized, is not entirely without institutions and orderly procedures.'⁵⁷ However, it adopts a wholly deterministic view of international relations: states, the only units of interest, are determined in their actions by the nature of the international system – or structure – in which they find themselves (hence the common characterisation of this school as 'structural realism'). Since states' actions are determined – and given that 'ought' implies 'can' – there is no place in international relations for normative argument.

Neo-liberals accept some of the premises of the neo-realist position but reject others, and certainly do not accept this conclusion. For example, neo-liberals have generally shared the neo-realist tenet of the primacy of states as the units of the system. Keohane and Nye were amongst the first to buck this trend of focussing exclusively, or almost so, on states as the actors in international affairs. Although in later works Keohane, in particular, reverts to near concurrence with the neo-realists that states remain the principal actors upon whom most attention must be focussed, he continues to insist that other, non-state, actors have an influence. The time may now be ripe to reappraise this again, back to his earlier view of a wider role for actors and influences other than states. Indeed, Nye has explicitly recognised this:

The information revolution and technological change have elevated the importance of transnational issues and have empowered nonstate actors to play a larger role in world politics. A few decades ago, instantaneous global communications were out of the financial reach of all but governments or large organizations such as multinational corporations or the Catholic Church. At the same time the United States and the Soviet Union were secretly spending billions on overhead space photography. Now inexpensive commercial satellite photos are available to anyone, and the internet enabled 1,500 nongovernmental organizations to inexpensively coordinate the “battle of Seattle” that disrupted the World Trade Organization’s meeting in December 1999.⁵⁸

Where neo-liberals have diverged most markedly from the neo-realist line is in insisting that there are mutual interests for states that make cooperation both possible and desirable. Whereas the realist assumption is that states, conditioned by the system, seek relative gain – i.e to enhance their position in the structure: their power relative to that of the other players; liberals argue that greater benefit accrues from focussing on absolute gain, which is most likely optimised through cooperation. Cooperation is made possible through the existence and development of international institutions, which Keohane⁵⁹ defines as ‘persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations’ These have three forms:

- Formal inter-governmental/cross-national non-governmental organizations, deliberately established by states, purposive and bureaucratic.
- International regimes, which consist in explicit rules, agreed by governments.
- Conventions, which are informal institutions: implicit rules and common understandings that allow effective coordination.

Such international institutions ‘make it possible for states to take actions that would otherwise be inconceivable’⁶⁰ However, as he points out later, it is not the case that international institutions always facilitate cooperation and, indeed, some cooperation can occur with the minimum of structure ‘..but all efforts at international cooperation take place within an institutional context of some kind, which may or may not facilitate cooperative endeavours.’⁶¹

Cooperation is distinguished not only from discord but also from harmony, thus avoiding realists’, and classically Carr’s, caricature of traditional liberalism’s moral universalism (see page 11). In a state of harmony one actor’s policies are automatically beneficial to others; in a discordant system, actors’ policies have a negative impact on others and are not adjusted in the interests of compatibility. Cooperation ‘requires that the actions of separate individuals or organizations – which are not in pre-existent harmony – be brought into conformity with one another through a process of policy coordination.’⁶² There is no assumption in this that it must be ethically benign – cooperation between one group of states could be deliberately or coincidentally detrimental to another state or group. Nor is it dependant on altruistic motives or idealism, but there is an implication of some shared values to underwrite the institutions through which cooperation is rendered possible. Furthermore, as will be discussed in the next chapter, ‘soft power’ (determined by such factors as status, respect, prestige) is in part determined by perceived legitimacy – and this does involve, at least implicitly, some degree of shared values.

Neo-realists and many neo-liberals have tended to share a view that the appropriate level of analysis of international relations is the structure of the system, departing markedly from their classical counterparts who clearly perceive a role played by individuals. This is a fundamental weakness for it seems plain that individuals – with all their strengths, weaknesses and peculiarities of character – can indeed have enormous influence on the direction taken by events. Consider the UK’s response to the Argentinean invasion of the Falkland Islands in 1982. It seems most unlikely that any subsequent Prime Minister would have reacted with the resolve of Margaret Thatcher.

Individuals do have an impact on international relations, not least, as it is one aim of this thesis to show, in armed conflict.

At one end of the spectrum of thought that it encompasses, liberalism may be seen to embrace pacifism. However, notwithstanding Kant and Wilson, liberals are not necessarily opposed to the use of force. Indeed, as argued in the previous section, there is a case to be made that liberals can be more prone to using armed force than realists. As AJP Taylor famously remarked: ‘Bismarck fought necessary wars and killed thousands. Liberal idealists fight just wars and kill millions.’⁶³ This is, of course, somewhat unfair; the wars Taylor ascribes to liberal idealists (and one assumes he meant the World Wars) are rather more easily categorised as classically realist: in the case of the First World War very much a product of European Great Power politics and in the case of the Second, a war of national survival. Nevertheless, an argument to which we will return is that the likes of Tony Blair (undoubtedly in the radical mould) should be seen in the liberal/revolutionist camp, and yet very ready to use force (at the very limits if not actually in breach of established international order) to bring about change on a ‘moralist’ agenda. And whilst most would characterise the foreign policy strategy of George Bush Jnr’s Administration as classically realist, a growing number are arguing his liberal (in an international relations sense) credentials, or at least a liberal strand in US foreign policy. For example Nye⁶⁴ highlights the tension between traditional (and multilateralist) realists on the one hand and an unlikely collusion of ‘Wilsonians of the right’ and ‘Jacksonian unilateralists’ on the other. Similarly, Edward Rhodes⁶⁵ points to a tension in the Bush agenda between imperialism and liberalism, whilst Gelb and Rosenthal⁶⁶ argue that current (2003) US strategy has thoroughly moral underpinnings. As well as making the point that liberals can be as aggressive (more so?) than realists, this perhaps also supports Wight’s view, as will be discussed below, of international relations comprising an interaction of competing voices.

The key point here, and notwithstanding a degree of positivism evident amongst some neo-liberal viewpoints, is that the liberal school of thought is, by and large, explicitly normative in its view of international relations. The next section now turns to a third school of thought that firmly rejects positivism and sees international relations very

much as a human activity and a normative field of study; it is a school that seeks to occupy ground between classical realism and classical liberalism.

1.1.3 International Society

The International Society approach to International Relations, also sometimes called the English School as its early proponents were largely working in England – principally at Cambridge – cannot trace its lineage back as far as the other traditions here described. Yet it can claim to be among the first attempts formally to determine an International Theory, standing in relation to international interaction as political theory does to domestic society.⁶⁷ It grew initially from ideas formulated by the British Committee for the Theory of International Politics, meeting under the chairmanship of Herbert Butterfield (Master of Peterhouse) and including Martin Wight, Hedley Bull, George Kennan, Garret Fitzgerald and Adam Watson, in the late 1960s/1970s. Its fundamental view is that the international order* comprises a system of states that over time become so involved with one another that each becomes obliged to take account of the others and modify its actions accordingly. In doing so they become more than a ‘system’; interaction becomes institutionalised, shared values and even some degree of common identity emerge; they develop, in short, into a ‘society.’

It is elemental to International Society thinkers that international relations is a human activity – the course of events is determined by the actions of individual men and women. It is therefore a normative activity, fully open to ethical consideration. Thus they reject the positivist approach that was contemporaneously developing in American-dominated International Relations thinking. (And part of the reason for the half-mocking label ‘English School’.) Whilst rejecting the idea that states’ actions and interactions are in anyway determined by the system in which they operate, International Society does accept the realist (both traditional and neo-/positivist) position that states are the units of the system. But it recognizes three levels of analysis with accompanying principles: the international/interstate level, where the principle of

* A value-free term, simply meaning the totality of states and the institutions whereby they interact.

equal state sovereignty is overriding; the domestic/individual level, where the principles are those of human rights; and the cosmopolitan or 'world justice' level at which the issues are those of what is good for the world as a whole (the level of analysis at which we consider such issues as global warming). Nevertheless, they recognize the primacy that has been afforded the state:

The principle that every individual requires the protection of a state, which represents him in the international community, is a juristic expression of the belief in the sovereign state as the consummation of political experience and activity which has marked Western political thought since the Renaissance. That belief has absorbed almost all the intellectual energy devoted to political study. It has become natural to think of international politics as the untidy fringe of domestic politics.⁶⁸

It is in rejecting the validity of the latter that Wight calls for the development of a theory of understanding of international relations in its own right – an International Theory.

Furthermore, International Society accepts the realist position that the international order is anarchical – but only in the sense that this means there is no world government, no higher authority above that of sovereign states. But this need not mean, indeed, International Society theorists argue it *does not* mean, that there is anarchy in the sense of chaos and eternal disorder. This is precisely what Hedley Bull is getting at in the title of his most well-known work 'The Anarchical Society.'⁶⁹

The International Society approach offers up the middle view in what might be seen as a triptych. Neo-realism has adopted a positivist position, on one side, and views the world order as a system of mechanistic interaction in which outcomes are determined by the nature of the system and the value of the units therein (in essence the relative power of states) and could be predicted through study. Such is the view, for example, of Kenneth Waltz⁷⁰ or John Mearsheimer who, whilst accepting that history is replete with examples where actual outcomes are at variance with what theory would predict, nevertheless insists on the validity of a broadly theoretical-predictive approach.⁷¹ On the other side is the liberal-cosmopolitan view of a world society, which takes a universalist approach to ethics and sees states as a historical and temporary abnormality; some even going so far as to predict their imminent demise. The middle way is to

accept the role of states but to see their interaction not as a mere 'system' but as a 'society' – something with normative value. Bull summarises the distinction thus:

A **system of states** (or international system) is formed when two or more states have sufficient contact between them, and have sufficient impact upon one another's decisions, to cause them to behave – at least in some measure – as parts of a whole.⁷²

By contrast:

A **society of states** (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.⁷³

The extent to which common values must pre-exist is an issue of debate. Certainly Bull recognized that historically international societies have been 'founded upon a common culture or civilization, or at least on some of the elements of such a civilization.'⁷⁴ But in the modern world are the interactions sufficient and the commonality of values so shared that a society can exist of all – or almost all - states? The answer depends on the depth and breadth of common values that are required and this is not a static factor – nor a one-way process. Increasing contact – socialisation, perhaps – is bound to help in the development of shared values and understanding, just as such commonality increases the level of contact. John Vincent⁷⁵ alludes to just this in his analysis of Bull, with whom he had collaborated:

The function of law in relation to international order, according to Bull, was not itself to produce it.... but to identify the constitutive principle in the international organization of humankind – the society of states;The interest in international law...was not for what it was, but for what it signified. It provided evidence for the existence of society, not the reason for its existence ... it is a cart not a horse.

In other words, in the case of international law it is facilitated by, not a facilitator of, international society. Surely a similar argument can be made for other 'common interests', 'common values' and 'common sets of rules.' It may be that very little commonality need be shared to prime the pump of international society, and once the society has emerged, commonality develops apace. In this respect interesting empirical evidence is offered by Paul Sharp by considering the most diverse of societies,

represented by the Taliban on one hand and the developed nations of the West on the other, and their interaction through the former's de facto ambassador in Islamabad, Mullah Zaeef.⁷⁶

Some of this may sound an echo of (or more correctly from a chronologic perspective, presage) Keohane's liberal institutionalism (see page 25). Nor should this surprise, for in claiming the middle ground, International Society is fully cognisant of the competing traditions in International Relations, Wight's 'three voices'- Rationalist, Realist and Revolutionist. It is not the case that any one of these traditions is correct and the others not; rather, International Relations must be understood in terms of a constant interaction between them. Figure 1-1 illustrates how these competing traditions can interact and sometimes merge at the boundaries.

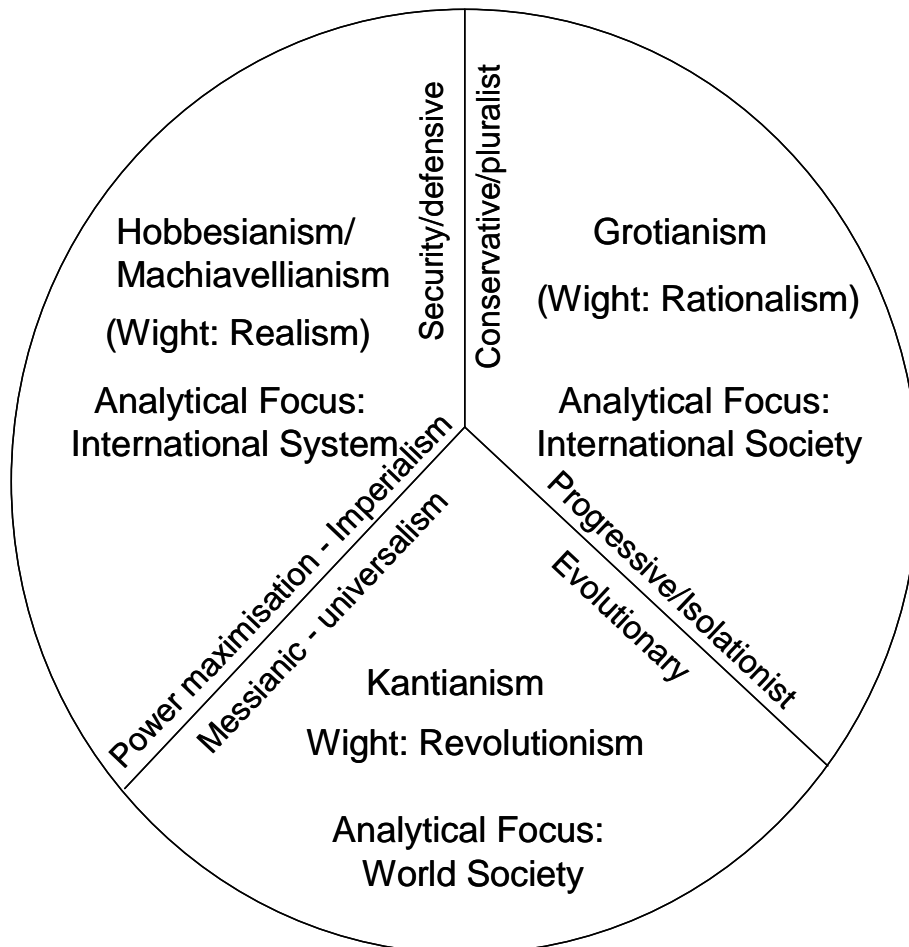


Figure 1-1: Three Traditions⁷⁷

As Wight⁷⁸ himself put it:

..the three traditions are not like three railroad tracks running parallel into infinity. They are not philosophically constant and pure like three stately, tranquil and independent streams.....They are streams, with eddies and cross-currents, sometimes interlacing and never for long confined to their own river bed. They are, to vary the metaphor, threads interwoven in the tapestry of Western civilization. They both influence and cross-fertilize one another, and they change. Although without, I think, losing their inner identity.

The constant presence of the three voices may also be seen, it has been argued, in the reality of the institutions of international relations. As a prime example, the UN's constitution demonstrates all three: the Security Council, enshrining the veto of the Permanent 5 members, reflects a realist balance of power; the equality of member states in the General Assembly is rationalist; and the growing body of human rights legislation and conventions at least nods in the direction of world society cosmopolitanism⁷⁹.

The International Society approach also recognises a constant interplay – sometimes a tension – between two important values: order and justice. Bull's principle interest is in 'order', which he defines as 'a pattern of activity that sustains the elementary or primary goals of the society of states, or international society'⁸⁰ but he recognises the importance of other values too, most notably justice. It is an accusation often thrown at the Western nations, and especially those who dominate the UN Security Council, that they value order over justice. Indeed the very construct of the Security Council points to this, as does, for example, the international legal principle of *uti possidetis*.^{*} Bull does not argue that order has any inherent worth greater than that of other values, only that it is, in some sense, a necessary precondition for other values to be realized:

International order, or order within the society of states, is the condition of justice or equality among states or nations; except in a context of international order there can be no such thing as the equal right of states to independence or of nations to govern themselves. World order, or order in the great society of all mankind, is similarly the condition of realisation of goals of human or of cosmopolitan justice; if there is not a certain minimum of security against violence, respect for undertakings and stability of rules of property, goals of political, social and economic justice for individual men or of a just distribution

^{*} *Uti possidetis* is the principle that in the process of decolonisation, particularly of Africa, old colonial boundaries would be accepted as the basis for independence and there would be no attempt to renegotiate boundaries amongst the emerging independent countries.

of burdens and rewards in relation to the world common good can have no meaning.⁸¹

Like any tradition offering some sort of ‘middle way’ – in this case between the realist and liberal traditions – the International Society approach opens itself to attack from both sides; there is too much talk of common interests and values to appeal to true realists and yet it is too cognisant of power-politics, and too privileging of sovereign states, for liberals. As Stanley Hoffman⁸² explains:

For realists and neo realists, whatever order exists in the endless ‘state of war’ results from states’ attempts to organise ever-shifting balances of power... (but) Bull’s work, for all its emphasis on common rules, institutions and interests, is too firmly anti-utopian, too closely tied to the system of sovereign states ... to please those for whom states are the problem, not the solution, in so far as order is concerned. Bull’s work is too ‘Grotian’ for the Machiavellians and Hobbesians, too statist for the Kantians and cosmopolitans.

It recognises both that war and a struggle for power are an inherent part of states’ behaviour, but also that there are elements of ‘transnational solidarity and conflict cutting across the divisions among states’ and of ‘cooperation and regulated intercourse between states.’⁸³

The enduring debate within the International Society tradition is whether as a ‘middle way’ the approach offers an end in itself or simply a pragmatic second-best on the road to a cosmopolitan world society, rather as Kant offered his federation of free states (see p22) as a compromise that was as much as the market would bear. Contrasting international society with international system, on the one hand, and world community, on the other, Chris Brown⁸⁴ defines it as ‘a norm-governed form of association, but the norms in question emerge out of the requirements for social co-operation and do not *necessarily* require commitment to any common projects, common interests or common identity beyond what is required for social coexistence.’ Whilst it is common to see international society as the middle term in a triptych of system, society, community – as, indeed, it has been described above (p30), this should not lead us, necessarily, argues Brown, to see the three as stages on a progressive path. Whilst there might be broad agreement that a mere system is undesirable, and similarly that world community is unattainable, there is less agreement about whether this latter is to be regretted:

One approach – probably the dominant one within the international society tradition – suggests that world community is not simply unattainable but would also be undesirable: on this count international society is to be valued in its own terms. But a second, minority, approach disagrees and holds that international society is a ‘second-best’ form of international order, an incomplete realization of our common humanity which is defensible solely on pragmatic grounds, as the only available alternative to the moral wasteland of a purely systemic approach.⁸⁵

Noting the general resistance to the case for a world state throughout the history of international theory, Martin Wight notes that:

Vitoria unconsciously took over Dante’s conception of *universalis civilise humani generis*, and strengthened it into an affirmation that mankind constitutes a legal community, but he repudiated the Dantean corollary of a Universal empire. Grotius and Pufendorf did the same, with the argument that a world empire would be too large to be efficient.⁸⁶

Both Bull⁸⁷ and Terry Nardin⁸⁸ exemplify the school that argues that international society is a valued end in itself. The key benefit that this approach offers over something more cosmopolitan is that it allows, even promotes, pluralism. It offers, in Nardin’s words, ‘an association of independent and diverse political communities, each devoted to its own ends and its own conception of the good.’⁸⁹ There is no reason why these communities should agree on common purpose or universal values; they have only to agree on common practices, and sufficient shared values to facilitate their cooperative and mutually beneficial co-existence. Such common practices are exemplified by the procedures (‘institutions’ in the approach taken by, for example, Nye and Keohane) of diplomacy and customary international law. Perhaps in this respect the archetypical example is the customary international legal principle of *pacta sunt servanda* – the obligation to abide by treaties freely entered into. Without such a common understanding what else would be possible? And, as noted above (see p30), like with liberal institutionalism the effect may be cumulative; greater inter-action may both require and promote greater commonality of values.

The wider is to be the membership of an international society, then the broader must be the appeal of its shared common principles, however limited these might be. This throws up a potentially significant problem if the society is to encompass different cultures. Brown notes the dilemma encountered by many who wish to be culturally

inclusive and yet have very firm ideals when it comes to individual human rights: 'Those who, within the west, overtly promote the virtues of toleration almost always have limits in mind, which, in practice, restrict the range of social practices that should be tolerated quite markedly and in this respect are no less intolerant than apologists for non-Western cultures sometimes seem to be.'⁹⁰ In this respect it is worth noting that in our domestic society it is often those most vociferously insistent on cultural inclusion that at the same time are most opposed to the attitude within other culture towards, for example, women or homosexuality. Brown continues: 'Nothing in the recent history of human rights protection gives reason for believing that a meaningful consensus on human rights – as opposed to a willingness to subscribe to unspecific norms which do not, in practice, affect state behaviour – actually exists.' Nor is this divide just religious/cultural or East/West. Consider, for example, the Death Penalty. The European Convention on Human Rights now prohibits its use in all circumstances⁹¹, yet 38 of the USA's 50 states, in addition to the US military and the Federal Government, retain it⁹². So even on a most fundamental issue we can find a divide in the often-supposed homogeneous Euro-Atlantic culture.

If finding the degree of common ground necessary for a widely inclusive international society is so beset with difficulties, then how much more so is the programme of those who see this as no more than a stepping-stone to a world community? Yet there are those who view the international society approach as just this. We have already seen that Kant (see p22) viewed his 'federation of free states' as a pragmatic compromise given that a true cosmopolitan world community was unattainable:

There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations... ... the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.⁹³

Brown⁹⁴ makes what he accepts is a more tentative case that Wight, too, should be regarded amongst those for whom international society is an incomplete realisation of

man's capacity to exist in a community founded on common humanity. More recently some, such as Mary Kaldor, have argued that there is evidence of such a cosmopolitan vision becoming reality. Kaldor⁹⁵ makes reference to 'the growing interconnectedness of states, the emergence of a system of global governance, and the explosion of the movements, groups, networks and organizations that engage in a global or transnational public debate (that call) into question the primacy of states.' She does not contend that this means the demise of states, although their sovereignty will be far more conditional than hitherto, but that 'the global system is increasingly composed of layers of political institutions, individuals, groups and even companies, as well as states and international institutions' and that 'the new understanding of civil society (represents) both a withdrawal from the state and a move towards global rules and institutions.'⁹⁶

Nevertheless, the mainstream view amongst followers of the International Society school is that International Society, as a middle way between a utopian world community and a non-normative international system, is a goal in itself. This interpretation of the school can be seen as particularly accommodating of the just war tradition, accepting as it does the inevitability of war and yet rejecting the realist assertion that war lies outside the scope of moral regulation.

1.1.4 Other Perspectives

As part of the foundation for making the case that just war doctrine has a continued relevance, the foregoing sections have sought to outline the major streams of thought in international relations theory that are likely to have an influence on today's policy makers. The next section will seek to make the case that just war does indeed have utility across these streams. However, before doing so there is a need to acknowledge that there are other perspectives. This is not a general survey of international relations theory and need not delve into the detail of every alternative view: critical theory, post-modernism, feminist perspective and so on. It is worth examining, though, two views that may be seen as extreme cases of two of the broad schools already outlined: Pacifism and Militarism. Pacifism has been mentioned already as a particular form of liberal utopianism; militarism can be seen as an extreme case of realism. It is a

viewpoint that not only accepts the inevitability of war but positively glorifies it and values it as a worthy human endeavour, understanding it 'as a matter of first preference rather than last resort, capable of delivering essential goods that are simply not reproducible by peaceful means.'⁹⁷ Or, as Hegel put it, a preservative of 'the ethical health of nations ... just as the movement of the winds preserves the sea from that stagnation which a lasting calm would produce – a stagnation which a lasting, not to say a perpetual, peace would also produce among nations.'⁹⁸

Placing these perspectives on a linear scale is relatively unchallenging. Mapping them to Wight's 'Three Traditions' is more complex but it is a reasonable approximation to regard militarism as sitting astride the overlap between realism in its most aggressive/imperialist form and liberalism at its most crusading; whilst pacifism sits at the other side of liberalism, possibly embraced by some international society theorists – those who see international society only as an incomplete realisation of world society. The Three Traditions model given on p31 might then be modified as shown in Figure 1-2. It is important at least to note these two perspectives because it is immediately apparent that they reject just war; but we must examine each to determine if it is relevant as an influence on today's policy makers.

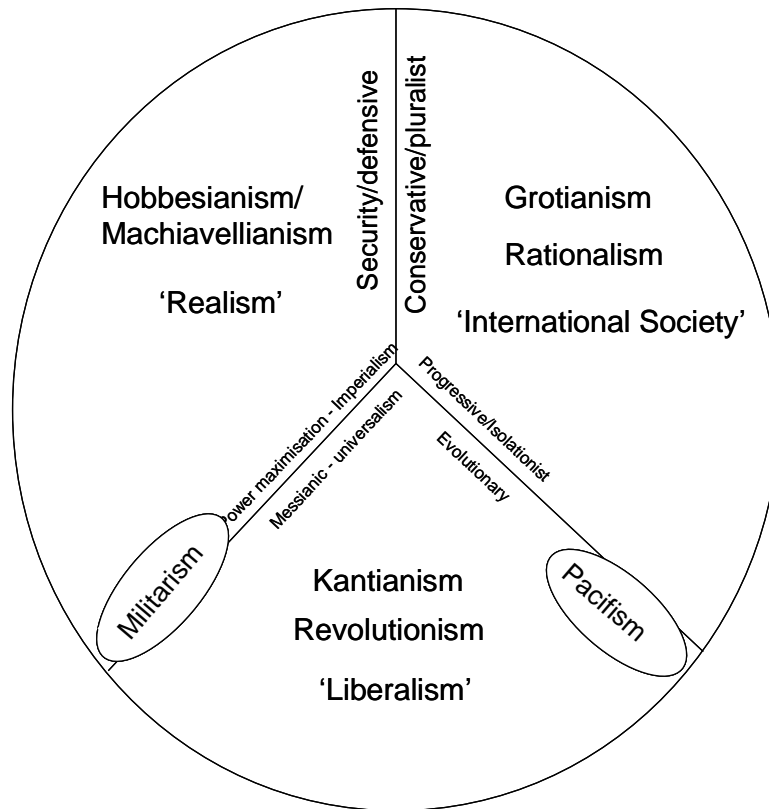


Figure 1-2 Militarism and Pacifism within the Three Traditions

It would be tempting to dismiss militarism as an influence on today's political elite, not least because of a tendency – one that Coates reminds us⁹⁹ should be resisted – narrowly to associate militarism with fascism. It can quite easily be similarly associated, particularly in the period from the end of the Second World War to the end of the Cold War, with revolutionary socialism as exemplified by the Soviet Union, her satellites and by communist China. We can note the propensity of leaders in these regimes to wear military uniform and to equate strength with military power. In Western Europe (and Germany most conspicuously) it is clearly eschewed. Whilst national ceremony may be dressed with military pageantry this cannot be equated with a favouring of martial values over civil ones. Perhaps it is a point to note, too, that such pageantry rarely has anything to do with modern military power – it is uniforms of, or based upon, earlier eras, horses and cannon rather than tanks and self-propelled artillery, that predominate at these occasions; not so with the displays of military might in militarist regimes – the Soviet May Day parades, for example. In the UK very few soldiers, and virtually none at senior rank, enter active politics; those that do quickly drop their military title.

Whilst the likes of Michael Heseltine and Iain Duncan-Smith may take every opportunity to wear their Brigade of Guards ties, this is perhaps more to do with pride in membership (however tenuously gained) of a rather elite club! There is slightly more tradition in the United States of senior military men moving into politics, continued most recently by General Colin Powell's appointment as George Bush Jnr's Secretary of State and by General Wes Clark's contention for the Democratic nomination in 2003. Clark's campaign web-site showed how much emphasis was placed on his military credentials.¹⁰⁰ None of this provides convincing evidence of militarism remaining an influence on the West-European or US policy elite. Nevertheless, consideration of General Galtieri's junta in Argentina, toppled following the Falklands Conflict in 1982, the Milosovic regime in Serbia, toppled following NATO's action in Kosovo in 1999, and Saddam Hussein's regime in Iraq brought down by (predominantly) the US and Britain in 2003, suggests that militarism may continue to be an influence on potential opponents.

Pacifism views war as beyond morality – not in the sense that realists see it, as something immune from the strictures of morality, but as an undertaking to which no moral worth can be ascribed. In its absolute form it argues that people 'should choose not to participate in war under any circumstances.'¹⁰¹ As such its adherents are often fiercely critical of just war proponents, seeing just war as an attempt to offer moral legitimacy to what is morally intolerable. Pacifism cannot be entirely ignored. Germany, for example, as she attempts to reshape her conscript army into a modern, versatile and professional military force, continues to run up against attitudes shaped by the ghosts of her very militarist past¹⁰². However, pacifism, like militarism, lacks any real impact today as an opinion-shaper, particularly for the US and the UK, which are the principal foci of this thesis. Whilst opposition to the 2003 war with Iraq was widespread and vocal throughout Europe, including the UK, America's principal ally in waging the war, little of that opposition was pacifist-based. Indeed, it was far more framed in the language of just war (as, indeed, were the arguments in favour of military action). In the UK, pacifism ceased to be an influential factor in mainstream politics (if it ever was) when the Labour Party dropped its commitment to nuclear disarmament.

1.1.5 A Conceptual Place for Ethics

Leaving aside militarism and pacifism, which it has been argued are extreme cases with little influence on policy makers, this thesis has now, then, to show that for those who determine the international policy, particularly of the UK and US, ethics can play a part in determining when and how to use military force, wherever their theoretical leaning lies within the 'Three Traditions' construct. In other words, that ethics – and especially just war doctrine – has a part to play for realists, liberals and proponents of International Society, when they consider when and how to use force.

Joseph Nye, whose work as a liberal-institutionalist was discussed above (see p24 *et seq*), suggests there are (at least) three evaluative approaches at work in International Relations (and therefore responses to war):

those of the sceptics, the state moralists, and the cosmopolitans. Although there is no logical connection, people who are realists in their descriptive analysis of world politics often tend to be either skeptics or state moralists in their evaluative approach, whereas those who emphasize a liberal analysis tend toward either the state moralist or cosmopolitan moral viewpoints.¹⁰³

Skeptics deny that normative argument has meaning in international relations; state moralists, in Nye's definition¹⁰⁴, 'argue that international politics rests on a society of states with certain rules, although those rules are not always perfectly obeyed.' Sovereignty and territorial integrity have emerged foremost among these rules. Cosmopolitans see the world in terms of a society of individuals – a world community – and base their ethical evaluations accordingly. Nye makes no specific mention of International Society as a theoretic approach, but if we follow his definition of state moralists it is clear that International Society adherents are likely to be, in the main, state moralists, with perhaps some skeptics at one edge of the school and cosmopolitans, as undoubtedly there are, at the other. Then we can imagine a loose mapping onto the three traditions model.

It should be clear that greatest difficulty will lie with the realist/moral-skeptic position, so that is where we should start. If the realist position is supposed to be a descriptive account of how things in fact are – the reality of the world, devoid of normative content

– then it seems it is just plain wrong; the realist account is not borne out by history. On the contrary as far back as we can look we can see attempts, at least, to limit the occasions for and impact of war. Michael Walzer, in his seminal work *Just and Unjust Wars*¹⁰⁵ argues that even the highpoint of Thucydides’ realism, the Melian Dialogue (see p7), is not as devoid of normative consideration as is commonly supposed. The Athenian generals talk of the necessity of their actions – because the alternative would make them appear weak and thus threaten the security of the Athenian empire. If the realist position they are taken to exemplify removes itself from the realm of moral discussion then no such justification is required. Moreover, Walzer argues¹⁰⁶, the rights and wrongs of the Athenian action can be debated – as indeed it was in Athens. Men might well mean different things in their use of words – one man’s cruelty is another’s severity – but the misuse of words to make or disguise a case does not mean that we do not, in fact, know the difference. The Athenians had earlier repented their harshness at Mytilene and similarly argued about the Melian decree, not just in terms of efficacy but in terms of rightness.

The Athenians shared a moral vocabulary, shared it with the people of Mytilene and Melos; and allowing for cultural differences, they share it with us too. They had no difficulty, and we have none, in understanding the claim of the Melian magistrates that the invasion of their island was unjust. It is in applying the agreed upon words to actual cases that we come to disagree.¹⁰⁷

Further weight is given to this argument if we consider the hypocrisy that throughout history has accompanied warfare – both in justifying resort to armed force and in excusing its conduct. Just as there is no sense in lying where truth is not assumed, so there is nothing to be gained from hypocrisy in a non-moral realm. Again, it is Walzer who best sums this up:

The clearest evidence for the stability of our values over time is the unchanging character of the lies soldiers and statesmen tell. They lie in order to justify themselves, and so they describe for us the lineaments of justice. Wherever we find hypocrisy, we find also moral knowledge.Hypocrisy is rife in wartime discourse, because it is especially important at such a time to appear to be in the right. It is not only that the moral stakes are high; the hypocrite may not understand that; more crucially, his actions will be judged by other people, who are not hypocrites, and those judgements will affect their policies toward him.

In this we see not only that realists are wrong in their description of how things are but also if we interpret them as telling us how things ought to be. There is good reason to give moral consideration to one's actions, because others will judge us upon them and this will affect their policies towards us. This issue will be explored in greater depth in the next chapter but for now let us just consider that even a full-blooded realist might like to consider the possibility that his state, or its sponsor, might not always be in the position of the Athenians – that of the dominant power. Allowing, even assisting, the development of broadly accepted conventions based on ethical, or at least apparently ethical, concepts whilst imposing some self-restraint now, might be a valuable insurance policy for the future.

To this we might add David Welch's argument (see p9) that the realist insistence on 'national interest' for foreign policy guidance lacks depth. Must the guidance be 'national interest' to the exclusion of all else? Or might it not be national interest within the bounds of certain general moral principles; would anyone really want to live in world where unrestrained national interest was the only guiding principle for nations' behaviour? Would this not indeed be Hobbes's state of nature? In any case when any of a number of actions are in the 'national interest', what calculus is to be used to determine the best course? At very least the arch-realist might concede, with Montesquieu, that 'The *right of nations* is founded on the principle that the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests.'¹⁰⁸ We might also add that for a government to act in the national interest is in itself a form of ethical motive; it is simply saying that the moral duty of a government is to act in the way that best serves the interest of its citizens. It is perfectly reasonable to argue that this is best (for them) done within a framework of certain wider considerations. In contrasting the relative success of the Congress of Vienna, against the failure of the treaty of Versailles, Henry Kissinger makes a similar point, that power and order need to be tempered with justice, for 'power without legitimacy tempts tests of strength; legitimacy without power tempts empty posturing.'¹⁰⁹

Realists might also recall that for all his urgings against the dangers of trying to act virtuously (see p6), Machiavelli stressed the importance of doing what is right where possible and maintaining at least the appearance of virtue:

a prince must want to have a reputation for compassion, His behaviour must be tempered by humanity.....need not necessarily have all the good qualities ... but he should certainly appear to have them. He should appear to be compassionate, faithful to his word, kind, guileless, and devout. ...in order to maintain his state he is often forced to act in defiance of good faith, of charity, of kindness, of religion... (but) he should not deviate from what is good, if that is possible, but he should know how to do evil, if that is necessary.¹¹⁰

Let us now turn to the other claim made by realists, that whatever the debate about going to war, once battle is joined there is no place for the soldier to debate ethics; he has neither the opportunity nor the motive to do so. Again, the evidence suggests this claim runs counter to what actually happens in war. Firstly, if soldiers are properly trained then an understanding of what is and is not correct conduct becomes part of their professional conduct so we are not demanding that they make *ab origino* judgements of morality in the heat of battle.* In Francis Ford Coppola's classic film about the Vietnam War, *Apocalypse Now*,¹¹¹ the central character, Willard, echoes the realist's sentiment: 'Accusing a man of murder in this place, was like handing out speeding tickets at the Indi 500†.' But he is wrong. Speed is the primary purpose – the end - of a motor race; murder – or even simply 'killing' – is not the end of war, though it may be a highly necessary means. Motor races are not without rules, they are in fact hedged by many rules to ensure that their end – speed – is achieved with due regard to safety. So if we take Willard's analogy, it is just as appropriate to limit the means of war, notwithstanding the end. Or, as Michael Howard¹¹² argues:

War ... is not a condition of generalized and random violence ... It is on the contrary a highly social activity – an activity indeed which demands from the groups which engage in it a unique intensity of societal organization and control.
... ..

... A breakdown of order leading to random and indiscriminate violence, as at My Lai (1969) is as repugnant to the professional military as it is to transcendent ethical values.

* Against this it might be argued that many wars are fought by militias, conscripts and irregulars. This, indeed represents a challenge and one that will be considered in Chapter 4.

† The Indianapolis 500; a motor race.

Such order and control is required in order to conserve both moral and material forces. There is to this, then, both an intuitionist moral dimension but also, perhaps more appealing to our realist-skeptic, a consequentialist perspective. Howard elaborates:

Whatever the objective aimed at or the weapons used, the plea of military necessity has to be brought into focus with two other requirements, arising from the nature of man as a moral and as a social being. The first imposes an ethical rule: one does not cease to be a moral being when one takes up arms, even if required by military necessity to commit immoral acts.And the second imposes a prudential rule: one should not behave to ones adversary in such a way as to make subsequent reconciliation impossible. War is instrumental not elemental: its only legitimate object is a better peace.¹¹³

Leaving the way open for subsequent reconciliation is a theme found in both Kant - 'No state at war with another shall permit such acts of hostility as would make mutual confidence impossible during a future time of peace.'¹¹⁴ - and Hegel: '...the determination of war is that of something that ought to come to an end. War accordingly entails the determination of international law that it should preserve the possibility of peace ...'¹¹⁵ A common moral understanding, or at least framework for moral understanding, must be a necessary condition for determining which acts are acceptable (for all is not fair in love and war) and which undermine the possibility of peace.

Related to this is the issue of reciprocity and escalation. Whilst such considerations might be purely practical in nature, they have a morally beneficial effect. Hitler's other atrocities – and his use of chemicals in his extermination camps – belie any claim that he may have abstained from the use of chemical weapons against the UK or against Allied troops on ethical grounds but, as the official history of the UK's chemical weapons research facility says:

The United Kingdom retaliatory capability had been developed after pre-war inertia and the means of defence improved. Undoubtedly this state of United Kingdom and Allied preparedness against possible Axis powers use of gas did much to influence the Axis decision not to use their considerable chemical warfare capability.¹¹⁶

The final response to those realists who adopt the moral-skeptic position is neatly summarised by Michael Ignatieff¹¹⁷:

What the history that stretches back to Dunant* seems to teach us is that war survives all forms of outrage at its barbarity, that it is pointless to dream of a world beyond war or to imagine a world where the warrior's art is no longer needed, and that the path of moral reason lies in subtlety, even casuistry: accepting the inevitability, sometimes even the desirability of war, and then trying, if it is possible, to conduct it according to certain rules of honour.Rules honoured more in the breach than in the observance are still worth having. There are human and inhuman warriors, just and unjust wars, forms of killing that are necessary and forms that dishonour us all.

He continues by quoting a Red Cross field delegate after the murder in Chechnya of six Red Cross workers: 'even in the middle of the worst depravities of war, man retains a fundamental minimum of humanity. Events like this can make it very difficult to maintain this belief. But without it we would have to admit that nothing distinguishes man from beast, and that we will not admit.'¹¹⁸ At the very least just war doctrine can offer us an idea of what it is that this 'fundamental minimum of humanity' comprises.

Ignatieff's argument, and the views he cites, would sit well with international societists who in rejecting the complete anarchy of realism whilst accepting the likelihood, even inevitability of conflict, nevertheless would seek ways to limit recourse to it and to mitigate against its excesses. For international society to exist and spread, the minimum necessary shared principles must be ones with broad appeal; surely the conditions under which resort to force is permissible must be amongst these. Bull¹¹⁹ notes that whilst '(i)t may be argued that it is perverse to treat war as an institution of the society of states, ... in the sense that it is a settled pattern of behaviour, shaped towards the promotion of common goals, there cannot be any doubt that it has been in the past such an institution, and remains one.' But he goes on to explain that from the perspective of international society there is a dual aspect to war:

On the one hand, war is a manifestation of disorder in international society, bringing with it the threat of breakdown of international society itself into a state of pure enmity of all against all. The society of states, accordingly, is concerned to limit and contain war, to keep it within the bounds of rules laid down by international society itself. On the other hand, war – as an instrument of state policy and a basic determinant of the shape of the international system – is a means which international society itself feels a need to exploit so as to achieve its own purpose.¹²⁰

* Founder of the International Red Cross.

Thus, for international society, whilst war may be inevitable, even necessary, it must be constrained by rules and conventions. Those Bull enumerates have a familiar ring to any student of just war. Wight offers a similar perspective on war from the rationalist voice within the three traditions:

There are two basic tenets to the rationalist theory of war. The first is that the object of war is peace, not vice versa. Peace is the norm, and war is the violation or exception; peace is logically prior to war. ... The second tenet of the Rationalist is that war is a necessary evil, to be minimized as far as possible. It is necessary because it is the only means of justice when there is no political superior.¹²¹

This latter concept of war being justified because of the absence of a higher authority to adjudicate and enforce peaceful resolution is very firmly in the just war tradition, made quite explicit, as we shall see, by Aquinas (see p50) and developed into international law by Grotius (see p53).

When we turn to the liberal tradition, where we can expect the predominant moral reaction to be a cosmopolitan one, there should be no challenge in gaining an acceptance that ethics plays a role in decisions to use force and in its subsequent employment. Liberalism – in all its forms – is much more obviously admitting of normative consideration. However, it encompasses both the extremes of pacifism and the near-messianic export of its values, which is as likely to result in use of force as any realpolitik. Thus at one extreme just war doctrine might be rejected as the appropriate framework by liberals: those close to the pacifist position will positively condemn it for too readily vindicating conflict. On the other hand, at the interventionist end of the school, just war may provide just the restraint that is needed in order to avoid the dangers of hubris or moral crusade, both of which can all too readily spring from the liberal tradition. The framework for debate provided by the doctrine of just war can be a useful tool for those who seek to provide a moral basis for the use of force in spreading the liberal agenda. Without such a framework there is a danger that, in Ignatieff's words, 'policy and public opinion are both likely to lurch continuously between the Scylla of hubristic overcommitment and the Charybdis of cynical disengagement.'¹²² In the same way that the conventions of *jus in bello* and *jus ad bellum* can be seen as amongst the shared values required for the existence of

international society, so too can it be argued that they count among the institutions of the neo-liberals.

The next Chapter will examine in greater depth the importance for having a solid justification for the use of force. First, though, we will trace the origins and development of just war doctrine and make the case that issues of *jus ad bellum*, having been rendered obsolescent by the middle of the 20th Century, have made a comeback with the apparent collapse of the legal paradigm that usurped them.

1.2 Historical Context: The Origins and Development of Just War Doctrine

Thucydides notwithstanding, it is quite clear that as far back as the ancient world there was moral debate and moral impact both on decisions to make war and conduct therein. Aristotle was amongst the earliest writers known to have argued for some circumscription of the use of force in the relationship between states. It is not something upon which he dwells long, indeed it is little more than a passing mention. However, he is quite clear that the only purpose of war is to obtain peace and he presents this in such a manner as to suggest that for him it is almost a truism. Indeed, it is offered more by way of an example of the difference between rational ends and means, those things which are good in themselves and those which are merely useful or necessary: ‘War must be looked upon simply as a means to peace, action as a means to leisure, acts merely useful as a means to those which are good in themselves.’¹²³ Not that this in itself limits recourse to war; it merely says that war is not, of itself, good. But shortly afterwards he continues¹²⁴: ‘... no state is to be admired, when the citizens are trained for conquest with a view to empire. This is a most dangerous precedent; for it implies that any citizen who can do so should seize power in the state to which he himself belongs.’ Such a principle is ‘not statesmanlike or useful or right. For the good is the same for states as for individuals.’ There is a clear contrast here, then, with the distinction developed later by realists between the morality of states and the morality of individuals. For Aristotle the behaviour of states, this seems to imply, sets a precedent for the behaviour of its citizens: a good reason, then, for ethical consideration before recourse to violence. He continues, more specifically:

Men should not be trained for war with the idea of enslaving those who deserve no such fate. The purpose of such training should be (1) to prevent their own enslavement; (2) to fit them for hegemony which will benefit those they intend to lead, not for the exercise of universal despotism; and (3) to qualify them for the mastery of those who deserve to be slaves.

Aristotle is offering, then an early justification of war on the grounds of self defence (to prevent enslavement) but also a very early justification of a view that re-emerges as liberal interventionism: 'mastery over those who deserve to be slaves'!

Around 300 years later Cicero was to reinforce the view, in *De Officiis* that war was only justified to establish peace, and to supplement that in *De Res Republica* with the stipulations that war had only two just causes: repelling an invader (ie self defence) and to redress an injury.¹²⁵

1.2.1 The Early Church and the Conversion of Rome

The spur for the development of the doctrine that was to form the basis of just war as we understand it today was the conversion of the Roman Empire to Christianity. The total pacifism of the early Christians had led to the martyrdom of many who had refused service in the Roman army, but a more significant challenge was presented by first the conversion of the Emperor Constantine and then, in 380 AD, by Theodosius's declaration of Christianity as the state religion. How was Rome to reconcile its need to defend – and extend – its borders, with the pacifist teaching of its new official religion? It is St Ambrose (AD339-AD397) who is credited with the initial formulation of the doctrine that resolved the dilemma, recognising that whilst peace was to be preferred, the reality of the imperfect world inhabited by man meant that there were just causes for using violence. Ambrose addressed not only the question of *jus ad bellum* but also offered an early formulation of *jus in bello*, urging restraint in the conduct of war and also in the aftermath of victory. He even went so far as to excommunicate the Emperor (Theodosius), pending public penance, following the massacre of 7000 Thessalonians in retaliation for their rebellion that had led to the killing of officers of the Roman garrison.¹²⁶

St Augustine, Bishop of Hippo, developed the doctrine, though not in a particularly comprehensive or coherent manner. His argument rested on the premise that order was a great good and a prerequisite for justice, so killing, if done from a position of due authority and in order to maintain order, was consistent with Christian belief. True peace could only be achieved in the City of God; the world of men was imperfect and so war could be justified, though, echoing Aristotle and Cicero, its only purpose was to obtain peace.¹²⁷ Augustine introduces the notion that it is the wickedness of the adversary that determines the justness of the cause. Nevertheless, Paul Ramsey¹²⁸ argues that Augustine's doctrine is better interpreted 'justified war' rather than 'just war' because there is 'a lively sense of man's common wrongdoing and of the judgement of God that overarches the justified war and not ... a sense of or clarity about the universal ethical standards that are to be applied.'¹²⁹ Thus the commonly held understanding that only one side can be fighting a just war is also rejected. Men are in no position to judge and the world they inhabit is an imperfect one, so there may be occasions on which they are justified in recourse to the use of force, but war, of itself, is never more than a necessary evil; it is never actually 'just'. This interpretation would stem the criticism sometimes levelled at the doctrine that it lends a status of moral respectability – even trumpeted righteousness – to war; in short it leads to moral crusading. Ramsey continues:

At least at the outset, the just war theory did not rest upon the supposition that men possess a general competence to discriminate with certainty between social orders at large by means of clear, universal, principles of justice, so as to be able to declare (without sin's affecting one's judgement of his own nation's cause) one side or social system to be just and the other's unjust. This was not the premise by which Augustine came to a confident enough judgement as to a Christian's responsibility in justifiable (if not unambiguously just) war.¹³⁰

Building on the arguments of Ambrose, Augustine also added in broad terms to the concept of *jus in bello*, insisting that mercy be shown to prisoners and that there be moderation in the general conduct of war.

1.2.2 Aquinas and Development of the Theological Doctrine

It was only some 900 years later that something resembling a coherent doctrine entered into the mainstream of Christian thought when St Thomas Aquinas included it in his *Summa Theologiae*. In fact much of the systematic codification had been completed in the previous century by Gratian of Bologna in his *Decretals*, but Aquinas's eminence brought it to new prominence.¹³¹ Drawing on the work of Augustine, Gratian and other scholars, Aquinas lays emphasis on wars of defence – for the protection of person, property or community; and to obtain redress for wrongs inflicted.¹³² Aquinas makes quite clear that the burden of proof lies with those who would resort to force, as is evidenced by his heading a section 'Whether it is *always* sinful to wage war?'¹³³

Justification of war, Aquinas sets out, rests on the satisfaction of 3 conditions:

It must be waged by the due authorities, for those who may lawfully use the sword to defend a commonwealth against criminals disturbing it from within may also use the sword of war to protect it from enemies without. But the cause must be just (those whom we attack must have done some wrong which deserves attack), and those waging war must intend to promote good and avoid evil.¹³⁴

If the latter two conditions were self explanatory to Aquinas as a religious scholar, then today, in secular debate, they perhaps beg as many questions as they answer. The challenges to received understanding of these will be the focus consideration later in this thesis. Aquinas does, however, expand on the first condition – that of due authority. He explains, for example, that 'fights are like private wars, conducted not by a public authority but by the unregulated wills of private persons. They are always sins ...'¹³⁵. This issue of due authority also opens debate in the contemporary context, especially as the primacy of the state is challenged by non-state, transnational and international bodies. For Aquinas it was relatively straightforward: due authority can readily be translated 'sovereign authority' and this, in his context, could only mean a state. Private citizens have no right to assemble armies and declare wars because 'if such a person has a serious grievance it is his duty and opportunity to apply for just vindication from the appropriate political authority superior to him.'¹³⁶ Tooke goes on to point out that even for Aquinas there should be some debate about what constitutes sovereign authority for, theoretically at least, the plethora of minor princes who between

them ruled most of Europe, all owed allegiance to the Holy Roman Empire and so all had an ‘appropriate political authority to whom they could turn for peaceful vindication of alleged wrongs.’ The reality, of course, was somewhat different and it can be argued that setting aside the particular political conditions of the day, Aquinas was seeking to make a much more fundamental point of enduring value:

By allowing the sovereign the ultimate power to make war, Aquinas, in his own political context, was admitting war between equals, that is, war between cities and provinces as well as kingdoms. That such should be legitimate when war between private persons is not so may be due to the fact that in the former case there is no effective higher authority having common jurisdiction over both parties, whereas local or national government supplied a means of resolving individual conflicts.¹³⁷

In the international system that was to emerge after the Peace of Westphalia (1648), these ‘equals’ were to be states and this paradigmatic right of states alone, within certain moral boundaries, to resort to use of force continued, effectively, until the signing of the Kellogg-Briand Pact in 1928. It can be argued that, eventually, with the UN and the International Court of Justice (ICJ) there arrived that ‘higher authority’ to which states could refer disputes – thus placing them on the same footing as individual citizens in Aquinas’ doctrine. So the justification for states’ use of force was undermined. Conversely, it may be argued that failure of the higher authority to be effective legitimises again states’ use of force.

Although, as noted, Augustine’s doctrine would perhaps better be interpreted as justified war – a necessary evil, never, per se, a righteous undertaking – and notwithstanding Aquinas’s ‘whether it is always a sin’, it is frequently held that in the Thomian period and beyond such restraint on war as the doctrine demanded, was understood only to apply between Christian states; war on unbelievers was inherently ‘just.’¹³⁸ Michael Ignatieff¹³⁹ makes the point thus:

In Medieval Europe, there was a distinction between *bellum hostile* (warfare characterized by restraint) and *bellum romanum* (warfare, in the words of the historian Michael Howard, “in which no holds were barred and all those designated as enemy, whether bearing arms or not, would be indiscriminately slaughtered”). Medieval Christendom carried this distinction into the Crusades

against Islam: unmitigated ferocity reserved for unbelievers. Islam responded in kind; * jihad was its very own *bellum romanum*.
... .. Out of (an) Enlightenment rage at Christian hypocrisy came a concerted attempt to frame a universalist ethic based on supposed facts of human nature, especially our universal susceptibility to pain and cruelty.

Like Augustine, Aquinas touches upon issues of just conduct in war but he too puts greatest emphasis on the right to wage war. Nevertheless, it is in the medieval period – and notwithstanding what has just been said about inter-faith warfare – that, through the merging of the Roman *jus gentium* (civil law) with chivalric codes, *jus in bello* as we recognise it today, with its twin pillars of proportionality and discrimination, begins to emerge.¹⁴⁰ It is also in St Thomas's writings that the first formulation of what is now known as the law of double effect can be found. Simply put this says that it is an act's intention that is to be morally judged, not its unintended, coincidental – even if foreseen – consequences: 'Now moral acts take their species according to what is intended and not what is beside the intention, since this is accidental.'¹⁴¹

The religious phase in the development of just war doctrine is drawn to a close in the writings of the late scholastics such as the Dominican Francisco de Vitoria (1480- 1546) and the Jesuit Francisco Suarez (1548-1617). The requirement that war be a last resort is largely attributed to Vitoria who repeatedly emphasises the need for prudence in resorting to force for 'not every kind and degree of wrong can suffice for commencing a war' and 'it is the extreme of savagery to seek for and rejoice in grounds for killing and destroying men whom God has created and for whom Christ died. But only under compulsion and reluctantly should the ruler come to the necessity of war.'¹⁴² For Vitoria '(t)here is a single and only just cause for commencing a war, namely, a wrong received.'¹⁴³

Suarez takes this further, arguing that the only just cause for war must be 'a grave injustice which cannot be repaired or avenged in any other way.'¹⁴⁴ This is what Ian Holliday¹⁴⁵ in his re-conceptualisation of just cause terms 'intractable injustice' – a replacement in the hierarchy of conditions for 'just cause' itself, which he raises to the capstone position erstwhile occupied by *jus ad bellum*. (Holliday's argument, which is

* And some might argue elements within the faith are doing so again.

to some degree contrary to Vitoria's and certainly less restrictive than Walzer's interpretation of Vitoria, will be considered further in Chapter 3). Suarez develops this further, introducing the notion of proportionality (with respect to means): 'it is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion.'¹⁴⁶

Finally, it is also in this era, and largely attributed to Suarez, that the notion of reasonable chance of success is introduced. Whilst there may be some moral worth in an attacked state attempting to defend itself against the odds, an offensive war, whatever its justification, is wrong if it does not have a reasonable chance of succeeding.¹⁴⁷

1.2.3 Secularization and Early International Law

The Christian Scholars discussed above were concerned with the reconciliation of Christian conscience on the one hand, with obedience to secular authority, and the maintenance of order, on the other. They were not attempting either to limit or, indeed, establish the rights of states (such as these existed) to use force as an instrument of their dealings with one another. As noted, Aquinas says little, explicitly, about what exactly constitutes either 'just cause' or 'right intent.' The departure witnessed in the works of scholars from the 17th Century on is the merging of these theological concepts with developing ideas of natural law and political philosophy – particularly emerging concepts of statehood and sovereignty. This entailed a more detailed examination than erstwhile of just cause and right intent, in particular. Among the many scholarly founders of international law, it is perhaps Hugo Grotius (1583-1645) who stands most prominent.

Writing against the backdrop of a states system that began, substantively, to emerge from the Religious Peace of Augsburg in 1555 and would be crystallised (after Grotius' death) by the Peace of Westphalia (1648), Grotius extensively codified and brought coherence to the work of many predecessors. Drawing a parallel between war and the juridical remedies within states, Grotius considers the maxim *ubi jus ibi remedium* (where there is a right there must be a remedy); in other words states can only have rights

if they have due recourse against transgression. From this he deduces that we must first determine the scope and extent of the legal rights of states.¹⁴⁸

Echoing Aquinas, Grotius notes that a private citizen whose rights are violated has recourse to juridical remedy but for states such higher authority is lacking, thus justifying recourse to war as a means to seek redress. Nevertheless, war is undertaken within the context of (international) law, not in abeyance of it:

Least of all should be admitted which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken it should be carried on only within the bounds of law and good faith. Demosthenes well said that war is directed against those who cannot be held in check by judicial processes. For judgements are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken. But in order that wars may be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be.¹⁴⁹

First addressing the issue of when war might be lawful in Book One, Chapter 2 ('Whether it is ever lawful to wage war') of *De Jure Belli ac Pacis*, Grotius concludes it is not contrary to the principles of natural law or reason that any society should look after its own interests 'provided the rights of others are not infringed' so 'use of force which does not violate the rights of others is not unjust.'¹⁵⁰ Much of the second book of *De Jure* is then devoted to discussion of when force can thus be legitimately used, i.e. without violating the rights of others. Amongst the causes he lists as clearly unjust, Grotius includes preventive wars against the increasing power of rival states, war for autonomy over or subjugation of others and for religious motives (already effectively banned by the Peace of Augsburg). Going on to enumerate a range of doubtful cases, he argues for caution when opinion is balanced, the presumption always being in favour of peace. Grotius' discourse on *jus ad bellum* is concluded with an admonition, after Suarez, against 'rash' war even when the cause is just.

As with religious formulations of the doctrine, Grotius' legal approach considers not just recourse to war but also its conduct. Book 3 of *De Jure* is largely given over to issues of *jus in bello*, conforming to the twin pillars of proportionality and discrimination. It should also be noted that Grotius' work is a treatise on the 'Law of War and Peace' and he places considerable emphasis on establishing appropriate

mechanisms for the peaceful resolution of disputes, including conferences, arbitration and even decision by lot! So, just as Aquinas rests the justification of resort to war on the absence of a higher authority who can enforce a just peaceful resolution, so Grotius acknowledges that any curtailment of a state's right to wage war, rests upon the existence of a mechanism that will render viable peaceful alternatives. He also follows Aquinas in noting that just cause alone is insufficient; the belligerent must also have righteous intentions: it is not acceptable to take advantage of the existence of a just cause simply to further one's own ends. We are also reminded that a just war can become unjust if it gives rise to unjust acts. (This is an issue to be examined further when considering how unjust conduct can undermine the grounds on which a war was embarked upon; *jus ad bellum* is not a simple hurdle that once crossed can be forgotten for the duration of the conflict; the grounds upon which a war is justified may have consequences for the manner in which it is prosecuted.)

Pufendorf (1632-94) followed Grotius' understanding of natural law and built upon its foundations an extensive codification of international law. Like Grotius he draws parallels between the domestic and international context and in his consideration of how war can be incorporated within the proper constraints of law, he too draws extensively on the just war tradition. It is a matter of natural law that men (and by extension states) should strive to live in peace with one another but war may sometimes be permissible or, indeed, necessary when there is no other way to defend what is ours or to vindicate our rights. 'In this situation, however, good sense and humanity counsel us not to resort to arms when more evil than good is likely to overtake us and ours by the prosecution of our wrongs.'¹⁵¹ Just cause is either defensive: essentially self-defence; or offensive: for the enforced extraction of reparation for wrongs done. But Pufendorf is firm about using force only as a last resort and warns of both openly unjust causes and those that have 'plausible pretext.' His work is notable for his anticipation of many of the questions that concern us today. He is explicit, for example, about the right to wage war on behalf of a third party – provided that party's cause is just, and the party coming to its aid has 'reasonable ground' for conducting hostilities. And he deals with the complex issue of a state's responsibility for the actions of those who have taken refuge on its territory and proceed to use it as a base to attack other states:

And in fact rulers of states do share in wrongs committed by their long settled citizens or by those who have recently taken refuge with them, if the rulers allowed the commission of wrongs or provide refuge. For such allowance to be culpable there must be a knowledge of the crime and ability to prevent it. Rulers are presumed to be aware of the open and habitual actions of their citizens, and there is always a presumption of their ability to prevent them unless there is evidence of its absence. However, the right to make war upon a ruler who accepts and protects a delinquent, who is seeking refuge with him solely to escape punishment, arises more from particular agreements between neighbours and allies than from any common obligation. This is not the case, however, if the refugee while with us is planning hostilities against the state he has left.¹⁵²

The secularisation of just war was effectively concluded by the work of Emmerich de Vattel (1714-67) who moved it beyond the realm of natural law and morality and into that of what he terms ‘voluntary law’. For, whilst Vattel accepts natural law as the basis for the rights of nations, he concludes that it is of no help in adjudicating disputes between them:

The doctrines laid down in the preceding chapter are a logical inference from sound principles, from the eternal rules of justice; they are the provisions of that sacred law which Nature, or the Divine Author of Nature, has imposed upon Nations. ... But how shall this law be made to prevail in the quarrels of the Nations and sovereigns who live together in the state of nature? They recognize no superior who shall decide between them and define the rights and obligations of each.....

Let us, therefore, leave to the conscience of sovereigns the observance of the natural and necessary law in all its strictness; and indeed it is never lawful for them to depart from it. But as regards the external operation of that law in human society, we must necessarily have recourse to certain rules of more certain and easy application, and this in the interest of the safety and welfare of the great society of the human race. These rules are those of the **voluntary** Law of Nations.¹⁵³

So natural law should be the guiding force for individual conduct including, indeed especially, that of sovereigns. Moreover, it is natural law that demands that nations see the benefit of agreeing to abide by certain principles of ‘voluntary law.’ Natural law on its own, however, cannot provide the objective framework to determine disputes between states, not least because all parties to such disputes will claim that right is on their side; there is no independent arbiter of natural law. So it is to voluntary law – objective and agreed – that we must turn for the regulation of conduct between states. This is the genesis of public international law as we understand it today.

These pioneers of international law were heavily influenced by Christian morality – Grotius’ work, for example, is peppered with enjoinders to love one’s enemy, to be killed rather than kill and so on – but the value of their contribution to the development of just war doctrine, is in moving it out of the realm of theology and into the secular field of international relations and law. The value of this is compounded by its coincidence with the emergence of the modern states system.

When by the Peace of Westphalia a crowd of petty principalities were recognized as practically independent states, the need of a body of rules to regulate their relations and intercourse became pressing. Such a code (if one may call it by that name) Grotius and his successors compiled out of the principles which they found in the Roman Law, then the private law of Germanic countries, thus laying the foundation whereon the system of international jurisprudence has been built up during the last three centuries.¹⁵⁴

However, the Peace of Westphalia can also be seen to mark another departure. The early Christian scholars, in seeking to reconcile the teachings of the scriptures with the need for ordered society, set out a view of a community of mankind (The Revolutionist of Wight’s three voices (See p31)). The likes of Grotius, Pufendorf and Vattel can be seen to have built on this to develop a concept of a community of states, regulated in their dealings with one another by international law (the Rationalist voice). However, by establishing an order which secured a privileged position for states above all else (the Realist voice), the Peace of Westphalia obscured this:

The opportunity which may have existed at the end of the Thirty Years War for substituting a new order based on the impersonal supremacy of international law for the old order based on the personal supremacy of the Empire, was not, however, utilized. Instead of creating a society of states, the Peace of Westphalia, while playing lip service to the idea of a Christian commonwealth, merely ushers in the era of Sovereign Absolutist states which recognized no superior authority.¹⁵⁵

As Gross’s title suggests, this order was to survive, virtually unchallenged until the Twentieth Century, and it is an order that still has a significant hold on our thinking.

So just war doctrine evolved from a vindication of war concerned, essentially, with an individual’s moral conscience, to one predominantly founded on the rights of states. Just cause and right intention are then interpreted in terms of, indeed become almost

entirely associated with, the vindication of states' rights. The weakness of this order is that in the absence of any mechanism for enforcing the peaceful resolution of disputes, self-help is the only way in which states can effectively enforce their rights, and that route is open to states in proportion with their power. Furthermore, as Skubiszewski points out,¹⁵⁶ in the period between the Peace of Westphalia and the signing of the Kellogg-Briand Pact, whenever force could be used to preserve, protect and vindicate rights, it was also invariably used to extend those rights; thus the totality of rights enjoyed by any individual state was relatively insecure.

1.2.4 Establishing the Legalist Paradigm: From The League of Nations and the Pact of Paris to the UN Charter Era

Whatever the insecurity of states' rights throughout this period, the paradigm survived for more than 250 years. It took the wholesale devastation of the First World War, together with the influential liberalism of Woodrow Wilson to convince states that something else was needed, and the ill-fated League of Nations was born. However, the Covenant of the League was largely about mechanisms to prevent war – particularly the 'accidental' slide into war that was seen to be characteristic of the First World War; it was not conceived as a restraint on states' sovereign rights. There had been earlier treaties restricting the issues over which states might go to war. The Hague Protocol of 1907, for example, prohibited parties from waging war in order to recover contract debt.¹⁵⁷ However, the Covenant of the League marked a sea change. It required that its members should refer disputes to arbitration, judicial review, or inquiry by the Council of the League. Once an arbitral or judicial decision had been passed down, or the Council inquiry reported, the disputants were prohibited from going to war for a further three months. Moreover, members were to refrain from going to war with a state accepting the decision of the arbitration or judicial review, or Council report.

This represented but a first step in a process aimed at prohibiting war, which was effectively concluded by The General Treaty for the Renunciation of War, signed on 27 August 1928 – the so-called Kellogg-Briand Pact, or Pact of Paris. Article 1 of the Treaty condemns 'recourse to war for the solution of international controversies' and

renounces states' use of it 'as an instrument of national policy in their relations with one another.' However, it retains the right of states to go to war in self-defence or against the violator of a treaty and also places no restriction on the League collectively taking enforcement action. Important step though this was, it referred only to war, with the result that many states have simply insisted that the conflicts in which they have been engaged have not amounted to war. Moreover, it established mechanisms neither for pacific dispute settlement nor for enforcement of the renunciation of war.

The UN Charter seeks to address these issues. Article 2(4) states: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' Thus in its choice of language it moves away from 'war' in favour of 'use of force'. Whether this terminology implies a prohibition also on uses of force other than armed force has been a subject of debate. Shaw¹⁵⁸ points out that although Article 2(4) – the classic statement of the prohibition on use of force – is unqualified, nevertheless both the preamble to the Charter and Article 51 (on the right to self-defence) refer specifically to 'armed force'. Although this is not, he concedes, conclusive evidence that Article 2(4) is intended only to prohibit armed force, it is strongly indicative. Likewise, although it has been argued that the prohibition is only on use of force aimed at 'territorial integrity' or 'political independence,' Article 2(4) is generally construed as a universal embargo on the use of force. For, as Skubiszewski argues¹⁵⁹ it must be seen in the light both of the preamble: 'ensure that armed force shall not be used, save in the common interest' and the obligation in Article 2(3) always to seek peaceful dispute settlement. The only exceptions are use of force by the UN itself (Articles 24, 39-50, 106), by regional organisations/arrangements acting under the auspices of the UN (Article 53) and, within certain limitations, in self-defence (Article 51). Thus, Skubiszewski goes on to argue, 'there is in the Charter not only a ban on the use or threat of force but also an attempt to centralize the competence to employ force in international relations.'¹⁶⁰ Even the right to use force in self-defence, as contained in Article 51, is limited to action 'until the Security Council has taken the measures necessary to maintain international peace and security.'

The right of intervention, erstwhile recognized by classical international law as lawful in certain circumstances (by a suzerain or protecting state, by authority of a treaty or for humanitarian purposes), is suspended by the legalist paradigm established by the UN Charter. Furthermore, non-intervention is made a principle without exception by UN General Assembly Resolution 2131 (XX) of 21 Dec 1965 which incorporates the ‘Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty’:

No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently armed intervention and all other forms of interference or attempted interference against the personality of the state or against its political, economic and cultural elements are condemned.¹⁶¹

We can see, then, that the underlying value hierarchy of the Charter paradigm is firmly based on a Westphalian privileging of the sovereignty of states, preferring order to justice. As Anthony Arend says:

Although justice – the promotion of human rights, the encouragement of self-determination, the rectification of economic problems, the correction of past wrongs and the equitable resolution of a host of other problems – remained a goal of the United Nations, it simply was not to be sought at the expense of peace. The framers of the Charter believed that a greater harm would be done to the international system by using force to promote justice than by allowing a particular injustice to continue. Thus, no matter how just the cause, any threat or use of force against the existing political or territorial integrity of a state was considered unlawful.¹⁶²

Contemporary debate about a right to humanitarian intervention or of the necessity for preventive war, for example, clearly runs entirely contrary to this foundation. Indeed, it can be argued that although on the one hand the UN Charter represents the apogee of Vattel’s ‘voluntary law’, nevertheless, through privileging states’ sovereignty above all else, it also enshrines a value set that gives primacy to order above all else – and, in particular, in preference to justice. This is the genesis of much of the contemporary dissatisfaction with the paradigm.

1.3 Summary

This chapter set out to show that there is a part for ethics to play in, at least, helping to determine when and how armed force should be used. To do so it has considered three broad schools of thought that can be argued to have greatest influence on contemporary international policy makers: realism, which at least in its stronger forms conventionally argues that warfare is beyond the realm of ethics; liberalism, which regards international relations as very much within the ethical arena but encompasses, at one end of its spectrum, pacifism, treating all war as immoral, and, at the other, a crusading moralism that can be as prone as realism, if not more so, to use of force; and international society, a more modern construct recognising continually competing ‘voices’ of realism, rationalism and revolutionism and which, in its reaction to war, both accepts the realists’ inevitability of conflict and the liberals’ placing of it within the guiding constraints of ethical deliberation.

Realism, with its roots in the writings of Thucydides, Hobbes and Machiavelli, holds that the determinant of when to use force is what is necessary (in the interests of the state), not what is right. Realists are sceptical about universal moral standards which can be seen to be, all too often, an attempt by some to identify their own values as those of the world as a whole. They emphasise the importance of power; it is required internally to a state to enforce order and its absence in the international setting is seen as rendering impossible an analogous community of nations. By contrast, a balance of power is necessary to preserve order and minimise conflict.

Realism can be seen either as descriptive or prescriptive. If the former then, it has been argued here, it is patently wrong; the history of war is replete with examples of moral deliberation and courageously moral action. If realism is taken to be prescriptive then the realist must be persuaded that acting within a moral framework is in his (nation’s) interest. This does not seem an insurmountable task when even Machiavelli and Henry Kissinger can be seen to recommend it! Realists, noting the danger to a state’s interests inherent in engaging in conflict, do, or should, wish to minimize both the incidence and extent of it. Even a powerful hegemon should recognise that the best path to retaining

its pre-eminence is to minimize the challenges to it. This it can do – as even Machiavelli concedes – through being perceived as legitimate. Both points suggest that realists might be open to persuasion that just war doctrine has relevance for them; unrestrained recourse to war both increases the generality of conflict (with all its inherent risks) and leads to resentment, fear and hatred of a powerful nation, which may increase the likelihood of assaults on its pre-eminent position. If we add the pragmatic need to conduct warfare in a manner that leaves open the way for eventual reconciliation, and consider, too, issues of escalation and reciprocity, then even the most hardened realist has good reason to seek also a morally based framework of *jus in bello*.

The intellectual tradition broadly termed ‘liberalism’ has as its unifying themes a far more optimistic view of mankind and a belief in an underlying moral unity of humanity. In its reaction to war it ranges from pacifism at one end of the spectrum to a crusading moralism – often all too ready to use armed force as its instrument – at the other. Locke’s political philosophy takes a view of mankind as both rational and progressive; man seeking to advance both his own and the common good through cooperation. Kant extends this to the international arena: a society of states is as rationally ordained at the international level as is a society of individuals at the national.

Cooperation rather than conflict is the central thesis of neo-liberalism in its response to structural realism: whilst the neo-realist argument assumes a zero-sum game in which relative gain is the principal measure of success, the neo-liberal thesis is that absolute gain is more important and is achievable through cooperation. This, in turn, is achieved through international institutions, formal and informal, explicit and conventional. When it comes to considering the liberal reaction to war, it is reasonable to conclude that an understanding of when it may legitimately be engaged in, and how it ought to be conducted, are amongst those institutions. Just war provides such a formulation and also provides a restraint against the tendency, found at one end of the liberal spectrum, towards moral crusading.

The international society tradition rejects the deterministic, system-oriented approach of neo-realism and neo-liberalism, seeing international affairs as a human-centred activity

and thus open to normative consideration. Yet elements of both classical and neo-liberalism are present. In particular the view of the international order as a society: states' interaction with one another is such that they must take account of each other, and the more they interact the more their interactions become institutionalized. Whilst rejecting positivism, most international society adherents nevertheless accept the realist tenet that states are the principal unit of international interaction (but in the form of their leaders, diplomats and so on). Furthermore, although they accept that the international order is anarchic, in the sense of having no authority higher than the sovereign state, they do not accept that this implies disorder and chaos. International society offers a middle way between a deterministic system, on the one hand, and a cosmopolitan world community, on the other. Although some would see international society as but a stepping stone on the path to a not-yet-attainable world community, the majority view within the tradition sees it as a desirable end in its own right.

International society, rejecting the anarchy of realism but accepting the inevitability of conflict and determining that it must be controlled and restrained, within a normative framework, is naturally amenable to just war doctrine. Moreover, the school seeks broad shared principles upon which society may be based. An understanding of the conditions under which members may take recourse to the use of force, and of how that force may be applied, must surely feature high in the list of priorities for these, and just war provides a suitable paradigm.

Drawing on classical tradition, the just war doctrine developed from a pragmatic response to a religious dilemma, concerning itself with the individual morality of those who had to engage in war. It was secularized and adapted in a way that helped to establish the rights of states. Only in the Twentieth Century were serious attempts made to curtail those rights with respect to waging war, eventually all but abolishing them and reserving to a supra-national body the right to authorise the use of force. Whilst maintaining much of the logic of the earliest just war scholars, this paradigm effectively rendered the doctrine redundant. The next chapter will argue that the reality of the post Cold War world, with the ending of the particular conditions created by the superpower stand-off, has shown the legalist paradigm based on the UN Charter to be inadequate.

Yet, as it will go on to show, there remains a need to justify recourse to war. If the legal paradigm was been found wanting, a return to first principles must again offer guidance.

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³ L Freedman, 'The Iraq Crisis' Kings College Lecture to UK Joint Services Command and Staff College, 29 Apr 03.

⁴ See, for example, N Fotion 'Reactions to War: Pacifism, Realism and Just War Theory' in A Valls (Ed) *Ethics in International Affairs* (Lanham MD: Rowman & Littlefield, 2000), pp15-32.

⁵ M Wight, *International Theory: The Three Traditions* (London: Leicester University Press for RIIA, 1996), p7.

⁶ A J Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p17.

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⁸ Thucydides, *The Peloponnesian War* (Translated Crawley, R) (London: Orion Publishing Group, 1995), pp 289 -290.

⁹ T Hobbes, *Leviathan* (London: J M Dent & Sons, 1965), pp64-65.

¹⁰ *Ibid*, p87

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¹³ *Ibid*.

¹⁴ D A Welch: 'Morality and "the National Interest"' in A Valls (Ed) *op cit*, pp7-8.

¹⁵ *Ibid*.

¹⁶ E H Carr *The Twenty Years' Crisis 1919-1939* (London: Papermac, 1946 (second edition)), p158.

¹⁷ *Ibid*, p159.

¹⁸ *Ibid*, p162.

¹⁹ *Ibid*, p166.

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²¹ A Hitler, *Mein Kampf*, cited in Carr, *op cit*, p167.

²² Tony Blair, Speech to US Congress, 18 July 2003. Published on 10 Downing Street web site: <http://www.pm.gov.uk/output/Page4220.asp> accessed on 19 Jul 03.

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²⁴ *Ibid*.

²⁵ Nicholas Fotion, *op cit*, p17.

²⁶ *Ibid*, p18.

²⁷ A J Coates, *op cit*, p18.

²⁸ Colin S Gray 'The RMA and Intervention: A Sceptical View' in *Contemporary Security Policy* Vol 22 No 3, December 2001 (London: Frank Cass for University of Birmingham Centre for Studies in Security and Diplomacy), pp 59-60.

²⁹ Genghis Khan, cited in Fotion, *op cit*, p31.

³⁰ William Shakespeare, 'The Life of Henry the Fifth' (Act 3, scene i) in *The Complete Oxford Shakespeare* (Oxford: OUP, 1987), p347. This passage was first brought to my attention by a review article in the Daily Telegraph: Adam Nicholson 'Watch This Henry V Before Going to War' 24 Jun 03.

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³² N Fotion, *op cit*, p20-21.

³³ A J Coates, *op cit*, p36.

³⁴ M Wight, *op cit*, p8.

³⁵ H Bull 'Martin Wight & the Theory of International Relations,' *ibid*, px.

³⁶ E Barker, *Social Contract, Essays by Locke, Hume and Rousseau with an Introduction by Sir Ernest Barker* (London: OUP, paperback edition 1960), p ix.

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⁴³ *Ibid*, p11.

⁴⁴ I Kant, 'Speculative Beginning of Human History', *ibid*, pp53-54.

⁴⁵ T Humphrey, *op cit*, p13.

⁴⁶ I Kant, 'To Perpetual Peace. A Philosophical Sketch', *ibid*, p109.

⁴⁷ *Ibid*, p111.

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⁴⁹ *Ibid*, p116.

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- ¹²⁴ *Ibid*, p213.
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- ¹²⁸ P Ramsey, 'The Just War According to St Augustine' in J B Elshtain (Ed), *Just War Theory* (Oxford: Blackwell, 1992), pp8-22.
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- ¹³¹ S D Bailey, *op cit*, pp9-10.
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- ¹³⁴ St Thomas Aquinas, *Summa Theologiae* (Concise Translation, Ed: T McDermot) (Westminster: Christian Classics, 1989), p367.
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- ¹⁴² Francisco de Vitoria, cited *ibid*, p11.
- ¹⁴³ Francisco de Vitoria, cited in M Walzer, *op cit*, p62.
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- ¹⁴⁵ Ian Holliday 'When is a Cause Just?' in *Review of International Studies*, Volume 28, Number 3, July 2002.
- ¹⁴⁶ Francisco Suarez cited in Arend and Beck, *op cit*.
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- ¹⁵⁰ Grotius, *The Law of War and Peace*, Book 1 Chapter 2, §6, *ibid*, at p334.
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- ¹⁵² *Ibid*, at pp346-347.
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- ¹⁵⁸ *Ibid*, p782.
- ¹⁵⁹ K Skubiszewski, *op cit*, pp745-746.
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CHAPTER 2: THE REQUIREMENT FOR ETHICAL JUSTIFICATION

2.1 Introduction

The survey of the historical development of just war doctrine in the preceding chapter ended with the UN Charter: the establishment of a legalist paradigm in which states' sovereign right to use force was curtailed almost entirely and the right to authorise violence was vested in a single supranational body. Moreover, in establishing a supranational body with the authority to resolve disputes, the Charter paradigm effectively reduces states to the position occupied by private citizens in Aquinas' doctrine. With a higher authority to which their disputes can be referred they no longer have legitimate cause to resort to force. In Vattel's terms (see p56) there was now a 'voluntary law' that fully determined *jus ad bellum*, leaving little room, therefore, for ethical discussion: in the second half of the 20th Century use of force was either lawful, in accordance with the UN Charter, or it was not. The role of ethics, then, was narrowed to considerations of *jus in bello* and the focus of the debate became the moral acceptability of certain types of weaponry and most especially the moral legitimacy of nuclear deterrence (with a side-bar discourse in the late 1960s and early 1970s over the particularities of the war in Vietnam)¹.

This chapter will first argue that the legal paradigm has failed to the point that it is now all but redundant. It failed in that it was too often held in abeyance by (mis-) use of the veto; in that it lacked an effective enforcement mechanism; in that nations have shown little faith in its institutions for peaceful dispute resolution; and that it has done little, in practice, to check nations' actual resort to force. Finally, having been established to contain the threat of inter-state-conflict, it has proved unable to respond to a changing geo-strategic environment in which the greatest threat to peace and security is more likely from intra-state conflict or internal oppression.

Having argued that the legalist paradigm has failed, this chapter will then argue that there remains a need for justifying the use of force, which if it cannot be found in law

must again be found from first principles – that is from ethical consideration. The requirement for justification of resort to force, and then of just conduct in conflict has three dimensions: international, national/domestic-political, and individual. It will be shown that internationally the perception of legitimacy is a key underpinning of ‘soft power’; that nationally it can have a significant impact on popular support for the government and its war effort; and that for the individuals who must engage in conflict a firm conviction that both their cause and their conduct is just has an important role to play in protecting the moral component of fighting power. (British Military Doctrine² defines Fighting Power in terms of three components: Physical, Conceptual and Moral.)

2.2 Why a Return to Ethics: The Legalist Paradigm Challenged

2.2.1 The Legalist Paradigm Examined.

Before claiming its actual or imminent demise, some further examination of the legalist paradigm is required to explain what it is that the term is taken to mean. It was argued in Chapter 1 (see p58 *et seq*) that post-World War One a sea-change took place with the first real efforts to restrict the sovereign right of states to make war. What has become known as the ‘peace through law approach’ was a distinctive movement within the new academic discipline of International Relations, coming to prominence in the early years of that discipline, but it was not itself new. Rather, it could trace its roots, as was shown in Chapter One, to the thought of Kant, of Grotius, of Vattel, and even to the treaty-law of the Greek city-states. So E H Carr’s characterisation of the approach as an ‘infantile disease of the newborn science of international relations’³ is inaccurate. Nevertheless, there are characteristics to the approach post-World War One that distinguish it from this earlier intellectual tradition and, indeed, justify use of the term ‘sea-change.’

Firstly, there was a marked increase in interest in the approach, which spread among, *inter alia*, ‘statesmen, intellectuals and common citizens....’ alike.⁴ Secondly, pre-war the focus had always been on developing and perfecting the existing system of international legal limitation on the use of force. The Hague Conventions of 1899 and

1907 had themselves been something of a sea-change for, as the editor of the *Translation of the Official Texts of the Conference of 1899* put it, they were the ‘first truly international assemblies meeting in time of peace for the purpose of preserving peace, not concluding a war then in progress.’⁵ However, in the light of the First World War, the law resulting from these conferences – the culmination of the pacifist-internationalist movement of the 19th Century – began to be seen as the wrong sort of law; it was a law that codified the rules of war, regulating it – and thus, in a way, condoning it – rather than condemning and preventing its occurrence. The development that was to follow, building through the Covenant of the League of Nations and the Kellogg-Briand Pact to culminate in the Charter of the United Nations – the eventual foundation for the legalist paradigm as it is found today – sought not merely to regulate war but to eliminate it from field of international policy.

A good example of the shift in perspective before and after the First World War is offered in the works of the influential writer on international law, Lassa Oppenheim. In 1911 Oppenheim was arguing that the nature of states was such that their relations with one another needed no enforcement mechanism. He argued that, unlike individuals within a domestic legal system, there were no offenders or individuals ‘who will yield only to compulsion,’ for ‘(p)eaceable adjustment of state disputes is in the interest of states themselves.’⁶ Such a view was firmly in the optimistic liberal tradition that EH Carr was to come to dismiss as ‘Utopian’ (see p10). But in 1919, Oppenheim’s view had shifted radically. In 1919, writing to Theodore Marburg, an organiser of the League of Nations Movement in the United States, Oppenheim wrote:

..... before the War I was of opinion like you that, if we only got the International Court of Justice established, no enforcement of its verdicts would be necessary ...

However, the war has changed everything, ...in case a party against which a verdict of the Court has been given disobeyed the verdict and resorted to hostilities, there is no doubt that the League would have to take the side of the attacked party.⁷

Fundamental to the ‘peace through law’ approach and the legalist paradigm in which it culminates, is what is often termed the ‘domestic law analogy’. This attempts to equate international law to domestic law in one of two forms. In its extreme and rarer form, but

philosophically the ultimate expression of the liberal tradition, it sees all citizens as parties before the law of a global super-state. More usually, and with adherents to be found within both the liberal and international society traditions, the analogy sees states as persons in an international system and before international law. Suganami cites the eminent international legal authority Hirsch Lauterpacht in noting a key issue over which the analogy breaks down: in domestic law, the use of force (except by the sovereign authority in imposing law) is prescribed but in international law the acquisition of property (territory) by force, or the conclusion of treaties under duress, had a long tradition all but enshrined as legitimate in the international system. It was this anomaly that had to be addressed:

The development of international law towards a true system of law is to a considerable degree co-extensive with the restoration of the missing link of analogy of contracts and treaties, i.e. of the freedom of will as a requirement for the validity of treaties, and with the relegation of force to the category of sanctions.⁸

The Covenant of the League of Nations begins to address just this ‘missing link’ when it states, at Article 10, that: ‘The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.’⁹ Thus, continues Lauterpacht, the Covenant ‘may be regarded as containing *in gremio*, the elements of this development.’

As was outlined in Chapter 1, the Covenant of the League required the submission to arbitration or judicial settlement of disputes ‘likely to lead to a rupture’, and imposed a ‘cooling off’ period during which recourse to war was prohibited.¹⁰ Moreover, the Covenant established the principle of collective security: ‘Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.’¹¹

The paradigm was further and most substantially developed by the concluding of the General Treaty for the Renunciation of War, the Kellogg-Briand Pact, of 1928. The Treaty is short and to the point, consisting of just three concisely worded Articles, the

third of which deals only with issues of ratification and effect. The meat of the issue, then, is in the first two articles¹²:

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Perhaps most striking is the number, and broad geographic representation, of states who initially or subsequently became parties to the treaty (see Table 2-1 and Table 2-2).

State	Date of Depositing Instrument of Ratification
United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, Union of South Africa.	2 Mar 1929
Poland	26 March 1929
Belgium	27 March 1929
France	22 April 1929
Japan	24 July 1929*

Table 2-1 Original High Contracting Parties to the Kellogg-Briand Pact. (Author's table).

State	Date of Depositing Instrument of Adherence
Afghanistan, Albania, Austria, Bulgaria, China, Cuba, Denmark, Dominican Republic, Egypt, Estonia, Ethiopia, Finland, Guatemala, Hungary, Iceland, Latvia, Liberia, Lithuania, Netherlands, Nicaragua, Norway, panama, Peru, Portugal, Rumania, Russia, Kingdom of the Serbs, Croats and Slovenes, Siam, Spain, Sweden, Turkey	Before the date of effectiveness of the Treaty, i.e. 24 July 1929
Persia	24 July 1929
Greece	3 August 1929
Honduras	6 August 1929
Chile	12 August 1929
Luxemburg	14 August 1929
Danzig	11 September 1929
Costa Rica	1 October 1929
Venezuela	24 October 1929

Table 2-2 Further Adhering States to the Kellogg-Briand Pact. (Author's table).

* At which point the Treaty was formally proclaimed.

Notwithstanding the significant steps represented by the Covenant of the League and the Kellogg-Briand Pact, they fell short of firmly establishing a legal paradigm for use of force. For a start, though the Covenant used the language of collective security, it established no mechanism through which that was to be effected, nor did it offer anything by way of enforcement. Although it required the referral of disputes to arbitration, it appears in the final analysis to have left *competence de guerre* in the hands of states. Moreover, it made specific reference only to ‘war’, thus being open to the interpretation that lesser acts of use of force remained permissible. Similarly, the Kellogg-Briand Pact offered nothing by way of collective defence or sanction against breaches, and it too, Article II notwithstanding, has been taken generally to renounce ‘war’, specifically, rather than all forms of armed action¹³. So although the League Covenant and the Kellogg-Briand Pact offered firm principles for the foundation of the legal paradigm, they provided no mechanisms through which it could be made effective.

As was shown in the last Chapter, the UN Charter attempts to address the failings of its precursors and to finally and definitively establish a legal paradigm for use of force. Firstly, its scope is broader – it is the ‘use of force’ or at least use of ‘armed force’ (see the discussion at p59) – that is prohibited, not merely ‘war’. With the exception of ‘individual or collective self-defence if an armed attack occurs’ and even then only ‘until the Security Council has taken measures necessary to maintain international peace and security’¹⁴ (and with the further, now anachronistic, exception of a resumption of hostilities by the Axis powers¹⁵), the right to authorise the use of force was taken from states and vested in a supranational body. That said, it is important to note that what is being discussed here is a legal paradigm for the use of force; it is not to suggest that the UN Charter represents the apogee of the domestic law analogy across international relations as a whole. Indeed, its structure and organisation deliberately sought to highlight a political rather than legal nature, recognising that one of the flaws of the League system was a too overtly legalist character, which had not shown itself the most effective way of resolving all international issues¹⁶. In terms of use of force, however, there can be no questioning that the Charter, in theory at least, establishes an unequivocal legal foundation for the use of force, and its prohibition in all other circumstances. The reality, of course, has been somewhat different and it is worth

recalling Lawrence Freedman's words, noted in Chapter One, (see p5) that the decision making processes of the Security Council – which establish the legality or otherwise of the use of force – are themselves political not judicial.

In summary, then, the legalist paradigm represented by the UN Charter and what flows from it, removes sovereign authority for decisions to use force from states and places it in the hands of the UN or, more specifically, in the hands of the UN Security Council. The definitive statements of this paradigm are to be found in the preamble to the UN Charter: 'armed force shall not be used, save in the common good,...'¹⁷; in Article 2(4): 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'¹⁸; and in General Assembly Resolution 2131 (XX), especially operative paragraph One: '... armed intervention and all forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.'¹⁹

Whereas, as will be argued below, the imperative of Article 2(4) has been widely flouted, the use of armed force 'in the collective good' by the United Nations was used only once in its first forty years – in response to the North Korean invasion of the South. UNSCR 82 (1950)²⁰ determined that North Korean action constituted a breach of the peace; UNSCR 83 recommended that 'the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'²¹; and UNSCR 84 effectively delegated command of the operation to the United States (original emphasis):

Recommends that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States of America;

Requests the United States to designate the commander of such forces;²²

All this was, however, only possible, because of the absence from the Council of the Permanent Representative of the Soviet Union who had withdrawn in protest at the continued occupation of the Chinese seat by the representative of Chiang Kai-Chek's

nationalist regime. Had the Soviet ambassador been present there is no doubt that the veto would have been used. Arguably there was a second instance of UN use of force in the establishment of the UN operation in the Congo 1960-64 (UNSCR 143 (1960)). However, the wording of the Resolutions and the limiting of the UN force to use of force only in self defence, was such as to make this much more akin to a traditional peace-keeping mission. Resolution 146, for example, 'reaffirms that the United Nations Force will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise.'²³

In effect then, the paradigm was held in abeyance by the particular circumstances of the Cold War. With the ending of the Superpower stand-off which that represented came a renewed optimism and expectation for the effectiveness of the organization together with a series of international crises that for the first time was really to test the validity of the paradigm – and in many respects to find it wanting. Linda Melvern²⁴ notes that the United Nations Security Council meeting in January 1992 had marked a turning point in history. As the first meeting of the Council held at head of state level it had captured the spirit of the age. The Council had met the challenge of Iraq's invasion of Kuwait and it seemed that at last the United Nations might realize the goals set by its founders in 1945.

Max Boot takes a similar line: 'With the end of the Cold War, the U.S.-Soviet rivalry that had paralyzed the Security Council had become a thing of the past, supposedly freeing the U.N. to become more assertive.'²⁵ The same sentiments are echoed by Mats Berdal²⁶:

The great illusion of the late 1980s and early 1990s was that the end of the Cold War would automatically translate into an 'effective' UN. It was an illusion that rested on the belief that the Security Council, after years of paralysis, would 'finally' be allowed to assume its 'primary responsibility for the maintenance of international peace and security.'

All three commentators point out two issues: that the Cold War rendered the Security Council impotent, and thereby nullified the UN's role in maintaining international peace

and security^{*}; and that the end of the Cold War was widely perceived as a new dawn for the UN's effective primacy in that role. The next sections will examine the failures of the paradigm, some evident from the outset and, indeed, exacerbated by the Cold War, others only highlighted as the Cold War ended and the opportunity existed for the UN Charter to operate as intended.

2.2.2 Structural Difficulties

It was suggested in Chapter One (see p32) that Wight's 'three voices' could all be heard in the structure of the United Nations: the liberal universalism of the revolutionists in the growing body of human rights legislation; rationalism in the institution itself, its embodiment of international law and the one nation-one vote formula of the General Assembly; but the loud voice of realism in the constitution of the Security Council. If, like the League of Nations before it, the United Nations owed its existence to the horror of global conflict, its founding fathers sought, nevertheless, to avoid the utopianism of the League. Thus it was forged not from the liberal idealism of a Woodrow Wilson, but from the hard-nosed diplomatic realism of Churchill, Stalin and Roosevelt. Obvious from the outset was that only the Great Powers (the US, Soviet Union, the UK and, to a lesser extent, China) acting in cooperation the way they had in the war would have the resources to restore normalcy to a devastated world. Great responsibility would fall to them and special provision would therefore be necessary to protect their own vital interests. This was fundamental to the organizational structure they initially sketched out at the Dumbarton Oaks Conference. Anjali Patil explains the logic thus:

The Major Powers assumed that whatever obligations were incorporated in the Charter, each member could hold on to the right to decide whether or not it would be a party to any projected action relating to the maintenance of peace and security. Each Major Power regarded the concurrence rule as safeguarding its own interests and assuring its collective dominance against any proposition that could be put forward to their disadvantage by any other Powers.²⁷

^{*} This is an important distinction. Whatever arguments may be made about its failure in this key role, there can be no disputing the important role the UN has played in facilitating global cooperation in many other fields – the International Postal Union is a good example of just one of its smaller, but very effective organs.

The operation and extent of the veto was, inevitably, a major cause of division at the 1945 San Francisco Conference that paved the way for the signing of the UN Charter; not only between the Major Powers (by then extended to include France) and the rest, but also between the big five themselves. Urged by President Truman to bring the Conference to a speedy conclusion, his Secretary of State, Edward R Stettinius Jr, argued that ‘it would be unwise to press too strenuously because of resentment which might be created with the other countries which might jeopardize the final outcome of our great undertaking.’²⁸ Among the issues still dividing the five powers was specifying ‘the parts of the charter on which the voting will not require unanimity on the part of the five great powers.’²⁹ A critical issue was the degree to which the veto might be used to prevent not only Security Council action on an issue but even its discussion of an issue. Stettinius sent a further memo to the President the following day:

We have reached a very serious crisis in the Conference in San Francisco. Gromyko told the meeting of Heads of five principal delegations last night that the Soviet Government would not agree to permit even QUOTE consideration and discussion UNQUOTE of any dispute or threatening situation brought before the proposed security council unless formal decision by seven members of the council including the unanimous vote of the five permanent members was taken. ... We have maintained however that ... (n)o individual member of the council should be in a position to stop the consideration and discussion of a dispute brought before the council.³⁰

Stettinius was able to announce the Soviet Union’s eventual agreement to the position of the other four Major Powers on 8 June³¹ and the conference was able to conclude its work.

Whilst this is evidence that the Powers other than Russia were keen to see some tempering of their veto power, the importance that all five attached to it, and that they had had to argue that position strenuously with the other nations is clear from the transcripts of their representatives’ closing statements. The Chinese said that

Starting from the premise that everyone desired to make the Security Council a strong and effective organ, there was no choice but to support the rule of unanimity as essential for its strength and effectiveness. The alternative was a voting system which, though it might be more perfect, could in any given moment, weaken the Council in its efforts to act promptly and effectively.³²

The Soviets hoped that: ‘The Security Council and the other organs of the Organization would be able to solve successfully the questions which would be raised in the future if the Organization possessed the chief condition for its success, unity within itself and, primarily unity among the Great Powers.’³³

The UK representative:

...wished to point out that the present voting provisions were in the interests, broadly judged, of all States..... Peace must rest on the unanimity of the Great Powers for without it whatever was built would be built on shifting sands.... The unanimity of the Great Powers was a hard fact but an inescapable one. The veto power was a means of preserving that unanimity, and far from being a menace to the small Powers, it was their essential safeguard.³⁴

A similar line was taken by the US representative who explained that ‘the Great Powers could preserve the peace of the world if united’ but ‘could not do so if dissension were sowed among them.’³⁵ Moreover, he reminded the Committee of the Conference that after eight weeks in conference it had been made quite clear by the British delegate in the previous meeting that the five Powers had gone as far as they could in compromising on voting procedures. Could delegates, then, ‘face the public opinion at home if they reported that they had killed the veto but had also killed the Charter.’³⁶ In, other words, the Major Powers were making it quite clear that without the veto there could be no Organisation. It is ironic to consider that, contra the Chinese position, it was so often to be the veto that was to ‘weaken the Council in its efforts to act promptly and effectively.’ Most decisively, as will be discussed later, it was the threat of the veto that played a large part in marginalising the Security Council in the Kosovo crisis in 1999 and again over Iraq in 2003. One practical development of note, however, is that although it was originally intended that any Resolution required the positive votes of all five Permanent Members, it came to be accepted that abstention was sufficient.³⁷

Throughout the Cold War the veto was used on a predominantly partisan basis by either the Western/NATO members of the P5 on the one hand or by the Soviet Union on the other, and rarely over issues that an impartial observer could recognise as being vital security concerns of the vetoing Power. Between 1946 and 1990 there were, for example, 43 vetoes of Resolutions on the issue of appointing the Secretary General, and

59 over membership issues³⁸. The broadly equal distribution of veto use between the 2 opposing sides is illustrated in Table 2-3.

Permanent member	Number of Uses of the Veto between 1946 and 1990
China	22
France	18
Soviet Union	124
United Kingdom	33
United States	82

Table 2-3 Use of the Veto, 1946-1990: Breakdown by State³⁹

What this does not show is chronological trends. In the early years the preponderance of vetoes was with the Soviet Union, reflecting, perhaps, dominance by the Western States resulting in their rarely having to use a veto. The development of the non-aligned movement in the 1960s and the enlargement of the Security Council from 11 to 15 members in 1966 changed the pattern, with the Western Powers increasingly having to use the veto against a growing Third World influence. At the same time a trend of US vetoes – often at odds with the other Western powers – was established over Middle Eastern issues.⁴⁰

It might have been hoped, even expected, that the ending of the Cold War stand-off would bring to an end such inappropriate use of the veto as a new international consensus was established, and the P5 would constrain themselves to use of the veto only as originally intended. Already, in the late 1980s there had been a reduction in use of the veto. Indeed, it was not used at all by the Soviet Union in the second half of the decade and the preponderant user was the United States, three times over Nicaragua, and repeatedly over issues linked to Israel and the Middle East; issues over which it was frequently at odds with its Western partners. Nevertheless, use of the veto fell. Soviet – and then, after 1991, Russian – attitudes towards the UN and cooperation with the Western Powers improved. The response to the Iraqi invasion of Kuwait appeared to mark a new dawn in international cooperation, and between May 1990 and April 1993 there were no vetoes at all.⁴¹

Iraq's invasion of Kuwait on 2 August 1990 was the first test of the international order beginning to emerge from the apparent, if then not yet certain, end of the Cold War. The speed and near unanimity of the response, firmly based on the principles and practices of international law and the framework of the UN Charter was good cause for optimism for proponents of the legalist paradigm. On the very day of the invasion the Iraqi action was condemned in UNSCR 660, passed by 14 votes to nil with only Yemen abstaining. There followed a series of resolutions, beginning with UNSCR 661 on 6 Aug – which specifically mentioned Chapter VII of the Charter – imposing various economic sanctions and trade embargoes. United States and United Kingdom military deployments to protect shipping in the Gulf and to reassure Saudi Arabia commenced almost immediately and continued throughout the autumn.

Speaking in the House of Commons on 6 Sep 1990, British Prime Minister Margaret Thatcher said:

If Iraq's aggression were allowed to succeed, no small state could ever feel safe again. At the very time when at last we can see the prospect of a world governed by the rule of law, a world in which the United Nations and the Security Council can play the role envisaged for them when they were founded, Iraq's actions go back to the law of the jungle.⁴²

In the context of the 2003 war with Iraq it is worth noting that even in 1991, when consensus for firm, and if necessary military, action was much more widespread, Thatcher was repeatedly pressed for assurances that no military action would be taken without further, specific authorisation from the UN Security Council.⁴³ Nevertheless, resolve was firm and the significance of the moment was well recognised. Neil Kinnock, Leader of the Opposition, noted that '...there is a feeling that, while no advantages of any description arise from the action of Saddam Hussein, the co-operation between powers that were, until a short time ago, deadlocked in cold war offers a new prospect for international security.'⁴⁴ Former Labour Defence Secretary and Chancellor of the Exchequer, Dennis Healey, spoke for many when he said:

The House will agree that Saddam Hussein will go down in history for at least one unique achievement: he has united all parties in the House of Commons, all permanent members of the Security Council and the overwhelming majority of members of the United Nations both on the objective of getting him out of Kuwait and on the best method of doing so – a blockade supported, if necessary, by appropriate force.⁴⁵

(Of course, history was to show he could be equally successful at achieving the opposite effect, in 2003.)

In noting this optimism and near-unanimity it is important not to over-stress it. There was division and there was scepticism, particularly from the UK, as to the viability of taking the UN route to a solution. Thatcher was the leading sceptic, unconvinced that the UN could deliver, as her memoirs show:⁴⁶

This meeting^{*} also saw the beginning of an almost interminable argument between the Americans – particularly Jim Baker – and me about whether and in what form United Nations authority was needed for measures against Saddam Hussein. I felt that the Security Council Resolution which had already been passed[†], combined with our ability to invoke Article 51 of the UN Charter, on self defence, was sufficient. (M)y attitude, which had been reinforced as a result of our difficulties with the UN over the Falklands, was based on two considerations. Firstly, there was no guarantee that the wording of a resolution, which was always open to amendment, would finish up by being satisfactory. ...

...
Second, although I am a strong believer in international law, I did not like unnecessary resort to the UN, because it suggested that sovereign states lacked the moral authority to act on their own behalf. ... The UN was a useful – for some matters vital – forum. But it was hardly the nucleus of a new world order.

Encapsulated in this short passage is a summary of all the traditional doubts about the role of the UN: its inability to take resolute action, its openness to political bias rather than subjective application of law, the danger of the veto rendering it impotent, and an ideological objection to the very idea of any authority greater than that of sovereign states.

Nevertheless, the gradual build up of US-led coalition forces, initially for the defence of Saudi Arabia against any further Iraqi expansionism but eventually clearly intended for the forcible removal of Iraqi forces from Kuwait, continued to enjoy increasing UN authority for action. Any doubt that might still have existed in some minds was finally removed by Resolution 678 of 29 Nov 1990⁴⁷ (original emphasis):

Acting under Chapter VII of the Charter,

^{*} On Sunday 5 Aug 1990 in the Whitehouse with US President George Bush, National Security Advisor Brent Scowcroft, Vice President Dan Quayle and Secretary of State James Baker.

[†] SCR 660. It was regarded as sufficient authority for use of force in that it determined the existence of a 'breach of international peace and security' – generally taken as the cue for actions under Chapter VII.

1. **Demands** that Iraq comply fully with resolution 660 (1990) ...
2. **Authorizes** Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, ... , the above mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

If this first true act of collective security was the high watermark of the legalist paradigm, then it was not to be long before it ebbed. The almost three-year hiatus in use of the veto was broken in April 1993 by Russia⁴⁸ (having inherited the Permanent Security Council seat on the dissolution of the Soviet Union at the end of 1991). This was really a disagreement over organisational issues rather than a political spoiling action: concerned at the vastly burgeoning costs of the UN's rapidly expanding range of peace keeping operations, Russia objected to a proposal for UNFICYP's* financing to be regarded as expenses of the Organisation under Article 17(2) i.e. general expenses, the apportionment to states being determined by the General Assembly, as opposed to specific peacekeeping costs. The following year was to see the first (Russian) veto on issues relating to the situation in Balkans and in 1995 the first of a series of US vetoes over the situation in the Middle East and the Palestinian question.⁴⁹ In 1999 NATO nations attacked Serbia-Montenegro in response to the growing human rights abuses and oppression in the Serbian province of Kosovo. No UN Security Council authority was sought, and the reason given for this was the expectation of a Russian veto. No draft resolution was presented, no vote taken and so no veto cast so this 'virtual' or 'hidden' veto is not reflected in the official records. (There will, of course, be other instances of no actual veto appearing, but an issue not being presented because of the understanding that there would be one, which serves to disguise the full influence of the veto on the Security Council's actions). The threat of a Russian veto was held by the NATO nations to render the UN powerless to act and so they took the decision to act without authorisation – outside the confines, in fact, of the legalist paradigm.

Four years later, in early 2003, it was again the threat of a veto, this time by France, that the US and UK governments gave as the reason for taking military action against Iraq

* United Nations Force in Cyprus

without the specific UN authorisation that was to have been sought in the so-called ‘second’ resolution. This draft resolution, tabled on 7 March 2003, would have set a firm deadline by which Iraq was to comply fully with the provisions of Resolution 1441 (adopted unanimously on 2 Nov 2002 and giving Iraq a ‘final opportunity’ to comply with its obligations, dating back to the end of the 1991 Gulf War, to disarm of its chemical, biological and nuclear weapons). Failure to comply would have been the trigger for military action. Having failed to gain sufficient support for the draft, and with France threatening to veto, the resolution’s sponsors (the United States, the United Kingdom and Spain) announced on Monday 17 March that they would not put it to a vote.⁵⁰

The following day, opening the UK Parliamentary debate on the eve of taking military action, Tony Blair attacked the French position, and argued the case for using force without UN further sanction, thus:

Last Friday, France said that it could not accept any resolution with an ultimatum in it. On Monday, we made final efforts to secure agreement. However, the fact is that France remains utterly opposed to anything that lays down an ultimatum authorising action in the event of non-compliance by Saddam.

... .. The House should just consider the position that we were asked to adopt. Those on the Security Council opposed to us say that they want Saddam to disarm, but they will not countenance any new resolution that authorises force in the event of non-compliance. That is their position — no to any ultimatum and no to any resolution that stipulates that failure to comply will lead to military action. So we must demand that Saddam disarms, but relinquish any concept of a threat if he does not.

From December 1998 to December 2002, no UN inspector was allowed to inspect anything in Iraq. For four years, no inspection took place. What changed Saddam's mind was the threat of force. From December to January, and then from January through to February, some concessions were made. What changed his mind? It was the threat of force. What makes him now issue invitations to the inspectors, discover documents that he said he never had, produce evidence of weapons supposed to be non-existent, and destroy missiles he said he would keep? It is the imminence of force. The only persuasive power to which he responds is 250,000 allied troops on his doorstep. However, when that fact is so obvious, we are told that any resolution that authorises force in the event of non-compliance will be vetoed—not just opposed, but vetoed and blocked.

... .. If a member of the permanent five indicates to members of the Security Council who are not permanent members that whatever the circumstances it will veto, that is the way to block any progress on the Security Council.

The tragedy is that had such a resolution ensued and had the UN come together and united—and if other troops had gone there, not just British and American troops—Saddam Hussein might have complied. But the moment we proposed the benchmarks and canvassed support for an ultimatum, there was an immediate recourse to the language of the veto. The choice was not action now or postponement of action; the choice was action or no action at all.⁵¹

Leaders of the US and the UK were forthright in their condemnation of France's threatened veto and yet just one year later, on 25 March 2004 it was the US again casting its veto against a Resolution, tabled by Algeria and Libya, which would have condemned Israel for the 'extrajudicial execution'⁵² of Sheik Ahmed Yassin, a leader of the militant Hamas organisation. The US representative, expressing US concern at the killing, nevertheless gave the reasons for his veto as that the draft failed to refer to Yassin's or Hamas's terrorist activities; that the Resolution would not further the goals of peace and security in the region; and that it did not reflect the realities of the situation in the Middle East. Three other members, Germany, the United Kingdom and Romania, abstained.⁵³

The veto, then, established as an essential part of the structure of the UN to ensure the continued unanimity of the Great Powers has, throughout the history of the Organisation, left it powerless to act to enforce the legal paradigm for use of force. 'The new organisation failed before it began, for Washington conceived it with exceptions and loopholes, in an atmosphere of suspicion and manipulation, not as a forum for agreement, but as an instrument in the Great Power conflict.'⁵⁴ It is important to remember, though, that however the veto was to affect the operation of the UN, particularly through the Cold War years, without it there would have been no UN.

2.2.3 Practical Failings

Other failings of the UN paradigm are not so much structural – built-in to the paradigm, as is the veto – but practical, resulting from how the paradigm has developed in fact, been interpreted or ignored. This section will examine these areas of failure in practice.

2.2.3.1 Failure to Institute the Envisioned Mechanism for Enforcement

There are two particularly striking ways in which international law differs from domestic law. Firstly it lacks an effective enforcement mechanism. Secondly, submission to it is, in every important respect, voluntary. This will be evident from the examples considered below when looking at the lack of faith in institutions for peaceful dispute resolution. With the experience of the League of Nations era to draw upon, the founding fathers of the UN sought from the outset to address the first of these issues by establishing effective military forces to be placed at the organisation's disposal.

In Chapter One it was shown that part of just war reasoning of states' rights to use force was the lack of higher authority to which disputes could be referred for resolution. (See p50). The UN system seeks to remove the right of states to use force (with certain, very restricted, exceptions as has been shown above) and to reserve that right to itself. This can only work in practice if the UN has at its disposal the instruments to wield that force. It was therefore envisaged at the organisation's founding that it should indeed have such instruments available to it. The principles of states making troops and bases available to the Security Council and handing control of those troops to a Military Staff Committee composed of the Chiefs of Staff of the Permanent Five, met with little controversy at the founding conference.⁵⁵ Thus, Article 43 states:

1. All Members of the United Nations undertake to make available to the Security Council in accordance with special agreement or agreements, armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. Such agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members.....⁵⁶

Planning and direction for the use of these forces was to be the responsibility of the Security Council, aided by the Military Staff Committee, provided for in Article 47:

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and

- security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
 3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
 4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.⁵⁷

Had these two elements come to fruition then the Security Council would have had the 'teeth which the League had so conspicuously lacked and which the UN, it was believed, would require if it were to be an effective agent for peace enforcement.'⁵⁸ The importance attached to the issue might be gauged from the fact that it is the subject of the Security Council's very first Resolution⁵⁹, which requested that the Permanent Members direct their Chiefs of Staff, or their representatives, to meet in London in February 1946 as the Military Staff Committee and there 'draw up proposals for its organization.'⁶⁰ This it did, subsequently meeting from March onwards in New York.

It was immediately apparent, however, that the degree of consensus evident at Dumbarton Oaks and San Francisco on the principle of providing forces to the UN, would not translate into agreement about the mechanics of that provision or the size and shape of the force. Whilst there was agreement on certain basic issues, that the contingents would remain part of their own national forces, for example, rather than constituting a fully international and directly recruited force, differences emerged on nearly all important points. Not all disagreements split along East-West lines but the most important ones did. The Western Powers envisioned UN bases worldwide at which the contingents could be based. The Soviet Union vigorously opposed this. Western proposals to assist other states in the equipping and supplying of their contributions were similarly opposed by the Soviet Union as an attempt to secure further Western domination. Most importantly, no agreement could be reached on the

size of the force or the breakdown of contribution from each of the Permanent Members. At the top end of the scale, the US proposed a force of twenty divisions, almost 4000 aircraft and over 100 major ships! The Soviet Union perceived the UN as essentially Western dominated (as indeed its major organs remained until the substantial increase in Third World independent membership post-decolonisation, and the emergence of the Non-Aligned Movement). Consequently it would only support a much smaller force and one in which each element, land, sea and air, was constituted in equal proportion by each of the Permanent Members.

Negotiations in the Military Staff Committee and subsequent debate in the Security Council failed to reach agreement. So the provisions of Article 43 have never been met.⁶¹ The Military Staff Committee has remained in existence, meeting regularly in New York at the level of the Permanent Five's Defence/Military Attachés to the US. However, these meetings have rarely been more than a formality, opening and closing with no business on their agendas. The notable exception to this was during the 1991 Gulf War when the Committee initially played an informal coordinating role and then, in accordance with Resolution 665⁶², a more formal one.

Recognising, in 1992, 'that an opportunity has been regained to achieve the great objectives of the Charter'⁶³ Secretary General Boutros-Ghali called upon the Security Council to reinitiate negotiations on the 'special agreements' envisioned by Article 43:

Under the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements should no longer prevail. The ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response.⁶⁴

Boutros-Ghali recognised that any force thereby created was unlikely be large enough or well enough equipped to tackle a major modern army. It might, nevertheless, be sufficient to act as a deterrent or immediate response to a lesser threat, or to stabilise a situation whilst a large contributory force was assembled. He also drew a firm distinction between traditional peacekeeping, which was the business of the Department of Peacekeeping Operations (DPKO), administering specially contributed forces, and

peacemaking/enforcement under Chapter VII, which would require Article 43 forces and was the area to which the Military Staff Committee should confine its interest.

In practice little changed and the UN suffered bitter experience of difficult operations particularly in the Balkans, Cambodia, Somalia, Rwanda and the Democratic Republic of Congo, spanning the spectrum from peace keeping to peace enforcement. Secretary General Kofi Annan convened a High-Level Panel, chaired by Algerian diplomat Lakhdar Brahimi, to ‘undertake a thorough review of the United Nations peace and security activities, and to present a clear set of specific, concrete and practical recommendations to assist the United Nations in conducting such activities better in the future.’⁶⁵ Brahimi focussed not on forces for peace-enforcement but on the inadequacy of the current provisions even for more traditional peace-keeping operations. The first paragraph of his executive summary offers some damning conclusions:

Over the last decade, the United Nations had repeatedly failed to meet the challenge, and it can do no better today. Without renewed commitment on the part of Member States, significant institutional change and increased financial support, the United Nations will not be capable of executing the critical peacekeeping and peace building tasks that the Member States assign to it in coming months and years.⁶⁶

Brahimi noted, in particular, that missions must have robust doctrine and realistic mandates: although the principles of impartiality and of use of force only in self defence were the ‘bedrock principles of peacekeeping’⁶⁷, impartiality had to be interpreted as adherence to the principles of the Charter, not equality of treatment to all parties regardless of behaviour. There should be no more ‘complicity with evil’ and rules of engagement had to be robust enough that UN forces did not have to ‘cede the initiative to their attackers.’⁶⁸ Mandates had to be clear about the authority to use force. There had to be better mechanisms for determining the size and scope of the mission – and for tailoring it to the size of contingents actually committed by contributing nations. Better equipped and trained forces were required and they were to be able to support themselves properly. Development was required of the UN Stand-by Arrangements System (UNSAS) to identify likely available forces.

The Brahimi Report did not confine itself to the forces required for peacekeeping operations. Even when sufficient forces were provided, operations suffered from lack

of planning and guidance. So Brahimi also made recommendations on the management of operations from the UN's HQ in New York. He noted, for example, the patent inadequacy of just 32 officers in the DPKO providing military planning and guidance to forces totalling (then) 27,000 men in the field.⁶⁹ Then US Ambassador to the UN, Richard Holbrooke, highlighted the problem:

The peacekeeping department is effectively the UN's ministry of defence. They're running worldwide operations and they're stretched to the bone. They work round-the-clock and they don't have sufficient expertise. Some of the most basic components of responsible military planning are lacking in the UN system because of the resource crunch, lack of qualified military personnel and, above all, the fact that the peacekeeping department has not risen commensurately in size and quality with the dimensions of the challenge.⁷⁰

There had been attempts in the early 1990s, as the size and scope of UN missions increased, to reinforce the staff of DPKO by the provision of 'gratis' military officers, that is personnel seconded from (mainly Western) national armed forces that continued to meet their salaries. However, they had been phased out as a result of developing nations' concern that their presence – since they were only provided by nations wealthy enough to bear the cost – skewed the international representation within the department. UNGA Resolution 51/243 of 15 Sep 1997⁷¹ expressed 'serious concern at the impact on the geographical balance in some parts of the Secretariat of gratis personnel, in particular in the Department of Peacekeeping Operations...' and therefore called on the Secretary General to 'phase out expeditiously' all but a small number of closely defined appointments.

In the light of the Brahimi Report, attempts were made to improve upon UNSAS, as the panel had recommended, but with a mixed response from Member nations. UNSAS 'is based on conditional commitments by Member States of specified resources within the agreed response times.'⁷² The resources include formed military units, individual specialists (civilian and military), as well as supporting services, materiel and equipment, and remain on stand-by in their home country. Certain levels of training, equipment and sustainability are mandated and the system is intended to provide at least a starting point for DPKO in identifying resources which might be called upon.

The initiative began with a planning team instituted in 1993 when the first eight Member States joined the system (Chad, Ghana, Jordan, Netherlands, Poland, Sri Lanka, Spain and Syria). As at 1 Jul 2003*, 82 Member States were formally members of the System (having signed the MOU as a statement of intent), with 25 of those having progressed to ‘Level One’ – provision of a list of capabilities – and a further 10 having submitted initial planning data (‘Level 2’).⁷³ As of 2004, Jordan and Uruguay were the only Member States to have signed-up to a new Rapid Deployment Level – forces available within 30-90 days of signature of a Mandate – introduced in 2001.

Small steps in the right direction though UNSAS might represent, it remains quite patently woefully inadequate in terms of capability, readiness (30-90 days from mandate signature even for the highest level of readiness), and certainty (none of the resources is guaranteed to be available – it is only an offer of what a Member State might make available should it so choose). Most importantly, UNSAS is available only for peacekeeping (Chapter VI) missions and so falls far short both of the Article 43 capability envisioned by the Charter’s founders, and of the forces that Boutros-Ghali recognised as essential to ‘achieve the great objectives of the Charter’. (See p88).

The means for enforcement of the legal paradigm is simply not available to the United Nations.

2.2.3.2 Widespread Disregard for Article 2(4) in Fact.

As a measure of states responsiveness to the legal paradigm on use of force it is perhaps worth just a passing glimpse at the actuality of use of force since the adoption of the UN Charter and apparently outwith its constraints. Arend and Beck⁷⁴ offer a representative sample of such actions summarised in Table 2-4.

Year	Theatre of action	States taking action apparently in contravention of Article 2(4)
1954	Guatemala	United States of America
1956	Egypt (Suez Canal Zone)	Israel, United Kingdom, France

* As at 1 Feb 08, this was the latest Status Report Available on the UN web site.

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1956	Hungary	Soviet Union
1961	Cuba (Bay of Pigs)	United States of America (Sponsorship)
1961	Goa	India
1965	Dominican Republic	United States of America
1968	Czechoslovakia	Soviet Union (Warsaw Pact)
1973	Israel	Syria, Egypt
1960-75	South Vietnam	North Vietnam
1979	Kampuchea	Vietnam
1979	Afghanistan	Soviet Union
1979	Uganda	Tanzania
1982	Falkland islands	Argentina
1983	Grenada	United States of America
1989	Panama	United States of America
1990	Kuwait	Iraq

Table 2-4 Representative Sample of Actions Apparently Contravening Article 2(4).
(Author's table)

To this list might reasonably be added today, the 1999 NATO air attacks on Serbia and subsequent move into Kosovo and the 2003 US-led invasion of Iraq.

Of course, any such list is controversial. Those listed in the third column would all offer justifications for their action – and most often in terms of the exceptions to Article 2(4) – essentially a claim of ‘self defence.’ Arend and Beck make a case that ‘a putative norm is a rule of international law only if it is authoritative and controlling.’⁷⁵ If there is widespread disregard for Article 2(4) in practice then it can be argued that this central pillar of the legalist paradigm is no longer to be counted as an operative part of international law at all. Of course, it can be argued that Article 2(4) is part of Treaty Law not Customary International Law and so remains valid however often it may have been breached, but whatever its formal standing, if it is widely ignored then both it and the paradigm it has come to represent are ineffective. Another argument can be made that whatever the incidents of breaches, the vast majority of states continue to conform to the norm of Article 2(4) and it continues to act as a restraint on the use of armed force. However, as the examples above illustrate, it acts as a restraint only whilst states think it is reasonable. When they have thought that the circumstances are such as to override the constraint of Article 2(4) then that is what they have done. As such they

are making a judgement on political or moral grounds that they contend, in the circumstances, outweigh strict observance of the law. This, again, would suggest that the legal paradigm has failed.

The argument having been made that the mechanisms for enforcement of the legal paradigm are non-effective and that the paradigmatic constraint on use of force has been widely ignored, the next section will illustrate why there has been a lack of faith in the alternative, non-forceful, mechanisms for dispute settlement.

2.2.3.3 Lack of Faith in Institutions for Non-Forceful Settlement of Disputes.

To retain confidence in them, international institutions for peaceful dispute resolution, like any legal body, must both be effective and be widely accepted as impartial. For it is a fundamental principle of their sovereignty that all states are equal, as classically stated by Chief Justice Marshall in the *Antelope* case: ‘No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva * have equal rights.’⁷⁶

Effectiveness requires universal recognition, and yet the history of the second half of the Twentieth Century is replete with examples where states have chosen to ignore the authority of international institutions. A clear example is offered by the International Court of Justice (ICJ) and the 1984-1991 *Nicaragua vs United States* case. In 1984 Nicaragua went before the ICJ alleging that US assistance to the ‘Contra’ guerrilla movement was, on several counts, in breach both of Customary International Law and specific treaty obligations resulting from its 1956 Treaty of Friendship, Commerce and Navigation with Nicaragua. The United States contested the ICJ’s jurisdiction and when the Court ruled that it did have jurisdiction the US withdrew from any further part in the proceedings. Thus, when the Court moved on to consider Merits, no representation was made by the US as Respondent. The principle findings of the court⁷⁷ are summarised in Table 2-5.

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Serial	Alleged Activity	Nature of Breach	Contravening	Decision of the Court
1.	Training, arming, equipping, financing and supplying the <i>contra</i> forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua	Intervention in the affairs of another state	Customary International Law	In favour [†] by 12 votes to 3
2.	Attacks on Nicaraguan territory in 1983-84 and those interventions considered in Serial 1 that involved force	Use of force against another state	Customary International Law	In favour by 12 votes to 3
3.	Directing or authorizing overflights of Nicaraguan territory and certain acts at serial 4 immutable to the US	Violation of sovereignty of another state	Customary International Law	In favour by 12 votes to 3
4.	Laying mines in the internal or territorial waters of Nicaragua during the first months of 1984	Use of force against another state; intervention in the affairs of another state; violation of sovereignty of another state; interruption of peaceful maritime commerce	Customary International Law	In favour by 12 votes to 3
5.	The acts listed at Serial 4	Breach of obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (1956)	Treaty Law	In favour by 14 votes to 1
6.	Failing to make known the existence and location of mines it had laid	Breach of Obligations	Customary International Law	In favour by 14 to 1
7.	Production of a guerrilla training manual and disseminating it to the <i>Contras</i>	Encouraging certain contrary acts	General Principles of Humanitarian Law	In favour by 14 to 1 [‡]
8.	Attacks on Nicaraguan territory and declaration of a trade embargo	Depriving of its object and purpose the Treaty of Friendship, Commerce and	Treaty Law	In favour by 12 to 3

* At that time an independent state.

[†] i.e. of the plaintiff (Nicaragua).

[‡] but not that the acts committed were themselves immutable to the United States.

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		Navigation between the United States of America and the Republic of Nicaragua (1956)		
9.	Attacks on Nicaraguan territory and declaration of a trade embargo	Breach of Obligations under the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (1956)	Treaty Law	In favour by 12 to 3

Table 2-5 Decision of the ICJ in Regard to the Military and Paramilitary Activities (Nicaragua vs US) Case 1986. (Author's table)

The Court further decided (by 12 votes to 3) that the US should refrain from all acts that the Court had ruled in breach of legal obligations and (by 12 to 2 in the case of breaches of Customary International Law and 14 to 1 in the case of the Treaty of Friendship) that the US should make reparations to Nicaragua, the amounts eventually estimated by an independent international commission to be set between \$17-18 billion.⁷⁸ On 31 July 1986, Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates submitted a draft resolution⁷⁹ calling on the US to comply with the Court's decision (original emphasis):

Taking Note of the Order of 10 May 1984 of the International Court of Justice (S/16564) on the Provisional Measures of Protection, its Judgement of 26 November 1984 on the jurisdiction and admissibility of the demand on 9 April 1984 presented by Nicaragua and the final Judgement of the Court on Military and Paramilitary Activities in and against Nicaragua on 27 June 1986 (S/18221),

Aware that, according to the Charter of the United Nations, the International Court of Justice is the principal judicial organ of the United Nations and that each Member undertakes to comply with the decision of the Court in any case to which it is a party,

... , ... ,

2. **Makes** an urgent and solemn call for full compliance with the judgement of the International Court of Justice of 27 June 1986 in the case of Military and Paramilitary Activities in and against Nicaragua (S/18221); ...

The US exercised its veto. (The UK abstained). Explaining his country's negative vote the US representative argued that the resolution would have added nothing to the achievement of a peaceful and just settlement of the dispute; that it failed accurately to represent the situation in Central America; and he reiterated the US view that the Court had asserted jurisdiction without proper basis.⁸⁰ The matter was not formally closed until 1991 when, with the ending of the civil war and the election of President Barrios de Chamorro, Nicaragua withdraw the case⁸¹ as a result of intense pressure from the Bush Administration which made such renunciation a condition of future US aid.⁸²

The point here is not to attack the United States for its actions in Nicaragua, nor its refusal to recognise the jurisdiction of the Court, nor even its partisan use of the veto to protect itself from censure. Rather it is to highlight by way of a stark example, a principal failure of the legalist paradigm: the law is nothing if it is not applicable in equal measure to all. US rejection of the Court's jurisdiction was on the grounds that much of the world 'often opposes the United States on important international questions' thereby obliging it to 'reserve to ourselves the power to determine..(what falls) essentially within the domestic jurisdiction of the United States, as determined by the United States'⁸³ A similar statement is to be found as early in the development of the legalist paradigm as the US reservations to the post-World War One Peace Treaty with Germany, in the formative days of the League of Nations:

The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction, and declares that all domestic and political questions relating wholly or in part to its internal affairs, are solely within the jurisdiction of the United States and are not under this Treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations or any agency thereof, or to the decision or recommendation of any other Power.⁸⁴

Echoes of this resound today in the words of President George Bush: 'America will never seek a permission slip to defend the security of our country.'⁸⁵

The US raised concerns, too, about the nationality of some of the judges in the Nicaragua case. It firstly objected that 'of the 16 judges now claiming to sit in judgement on the United States in this case, 11 are from countries that do not accept the Court's compulsory jurisdiction.'⁸⁶ Moreover, the US argued that part of the

justification for its actions lay with Nicaraguan acts against El Salvador, in whose defence the US was acting. But ‘much of the evidence that would establish Nicaragua’s aggression against its neighbors is of a highly sensitive intelligence character. We will not risk US national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations.’⁸⁷ This latter point earned the following rebuke from Sir Robert Jennings⁸⁸, one of the judges in the case, who noted in his Dissenting Opinion:

I also wish to express my regret that, in a Court which by its Statute is elected in such a way as to assure “the representation of the main forms of civilization and of the principal legal systems of the world”, the United States in its statement accompanying the announcement of the non-participation in the present phase of the case should have chosen to refer to the national origins of two of the judges who took part in the earlier phases of the case.

In considering the just war requirement for sovereign authority (see p50 *et seq*) it was noted that the existence of supranational authority to which disputes could be referred for resolution would, as an implication of Aquinas’ doctrine, negate states’ rights to use force. By corollary, failure of such mechanisms to be effective would restore that right. The danger for a powerful state in placing itself above, or aside from, the law is that by doing so it offers justification for others’ use of force against it. Ironically, dismissing those who said the case for war with Iraq had not been convincingly made on the grounds either of threat or of humanitarian necessity, Prime Minister Blair argued that the true reason for war was to enforce compliance with international law: ‘The truth is abundantly plain in the motion before the House of Commons on 18 March, we went to war to enforce compliance with UN Resolutions.’⁸⁹

There is a second, related, point that emerges from consideration of this case: the danger, either in reality or perception, of the politicization of international bodies. In its rejection of the ICJ’s jurisdiction in the Nicaragua case, the US argued that the proceedings were a ‘misuse of the Court for political purposes’ and that the issue was ‘not a narrow legal dispute’ but

an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means – not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self-defence and is patently unsuited for such a role.⁹⁰

In the context of such a view, the legalist paradigm begins to look a little hollow. Yet it is a view that the United States' detractors also throw at the ICJ. James Pione⁹¹ points out that Judge Schwebel, one for the 15 ICJ judges who heard the Nicaragua Case and who almost unswervingly voted in the United States' favour, was an American and had held a string of appointments in the US State Department before his election to the ICJ. Pione⁹² also argues that ICJ is institutionally biased:

Do the rules of the ICJ make it an unbiased forum for international law? Not if you look at the way that judges are elected to the ICJ: through a vote in the United Nations, with special weight to the Security Council. Taken at face value, this could seem fair, but it actually isn't. The United States, United Kingdom, and France are permanent members of the Security Council, which gives three of the most powerful NATO nations a lot of power. Also the Netherlands and Canada are members of the Security Council.* This amount of power for NATO countries gives them the ability to heavily influence the outcome of an election of judges to the ICJ.

Politicization of the ICJ was raised again more recently over the issue of the legitimacy of Israel's building of a 400-mile long security barrier separating Israeli centres of population from Palestinian areas of the West Bank. On 8 December 2003, the UN General Assembly passed a resolution⁹³ by 90 votes to 8 (with 74 abstentions) deciding to request of the ICJ an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council General Assembly resolutions?

Israel saw the building of the barrier as an essential security measure in the light of the casualties being sustained from terrorist attacks: more than 900 deaths and thousands of injuries over the preceding 3 years. To the Palestinians, on the other hand, the security barrier was an 'apartheid wall', severing communities and cutting off many Palestinians not only from friends and families but from employment and amenities.⁹⁴ Whilst opposing the building of the wall and holding it to be in contravention of international law, the UK, in common with all European Union states (including those then seeking

* At the time of the initiation (1999) in the ICJ of the Cases of Yugoslavia vs United States, United Kingdom, Belgium, Canada, France, Germany, Italy, Greece, Netherlands and Portugal.

accession) opposed referral of the issue to the ICJ, believing it ‘inappropriate to embroil the court in a heavily political bilateral dispute.’⁹⁵ The US took a similar line. The ICJ did not bow to pressure and gave its opinion on 9 Jul 2004.⁹⁶ Firstly, it decided unanimously that it did indeed have jurisdiction to give the requested advisory opinion and, by 14 votes to one, decided to comply with the request. The dissenting judge (Buerghenthal), whilst finding in favour of the court’s jurisdiction, felt it lacked the evidence on which to reach an opinion on Merits and therefore should have exercised its discretion in declining to offer one. Again by 14 votes to one, the Court’s opinion was that construction of the wall was contrary to international law. Unsurprisingly, Israel rejected the Court’s judgement outright, declaring it the ‘result of a politically motivated maneuver’ and refusing to ‘accept this politicization of the Court.’⁹⁷ The US reiterated its earlier position: ‘we do not believe that that’s the appropriate forum to resolve what is a political issue...’⁹⁸

The message from the Euro-Atlantic states, then, is clear: the ICJ is not the appropriate forum for deciding political issues. But surely any likely *causus belli* will be a political issue so they are denying a role in conflict resolution to this central institution of international law. Not only, then, will some argue that the institutions of peaceful conflict resolution are politicized, or risk being so, but the Western world also appears to be saying that international legal apparatus is not, in any case, the appropriate road to dispute resolution!

2.2.4 Reordering the Value Set: New World Order and Continued Failing of the Paradigm

Given the background against which its establishment was set, it is hardly surprising that the legalist paradigm established by the UN Charter sets the maintenance of order as the highest principle, to which all others must play a secondary role. Although not specifically of the UN’s making, a clear example of this value-ordering is the principle of *uti possidetis*. In point of fact the principle considerably predates the Charter paradigm, emerging in the early nineteenth century as the new states of Latin America established their independence from Spain and Portugal and accepted as their frontiers

the former administrative boundaries of the colonial rulers.⁹⁹ In the UN Charter era *uti possidetis* has been widely applied in the post-war decolonisation of both Asia and Africa. The UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Resolution 1514(XV), 14 Dec 1960) whilst strong in its support of the principle of self-determination, nevertheless treads a careful balance between this and territorial integrity of all states: 'Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'¹⁰⁰ At its second summit, in Cairo in 1964, the Organisation of African Unity explicitly adopted the principle of *uti possidetis*, establishing it as an important principle of African politics.¹⁰¹ Yet despite the apparent stability of borders that the principle ensures, the evidence of recent years, most especially in Sudan and in the Great Lakes region, has demonstrated the fragility of a construct that ignored tribal loyalties and ethnic distribution. Indeed, Basil Davidson has gone so far as to suggest that the attempt to impose a European-style states system in Africa may be the final curse left behind by the imperial powers.¹⁰²

Today we can see a substantial re-ordering of values that places justice at the top. As early as 1990, American international legal scholar Thomas Franck was putting forward a view that extended the use of force to uphold the rights of the individual:

Whatever decent instincts came to cluster around the magnet of 'self determination,' creating a widely accepted exception to Article 2(4), must now carry forward, in the post-colonial era, to imbue a new internationally recognized human right to political freedom. ... Kin to such a right would be another: a right of the democratic members of the international community to aid, directly or indirectly, those fighting for their democratic entitlement.¹⁰³

The United Nations, too, recognised that the paradigm restricting use of force to self-defence was overly constraining in the emerging post-Cold War world order. In 1991 Secretary General Javier Perez de Cuellar said: 'It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights can be massively or systematically violated with impunity.'¹⁰⁴ It was on the logic of this that NATO's attack on Serbia in 1999 was justified. During the intensive air operations that

followed, UK Prime Minister Tony Blair made a seminal statement in a speech at the Chicago Economic Club:

Twenty years ago we would not have been fighting in Kosovo. We would have turned our backs on it. The fact that we are engaged is the result of a wide range of changes - the end of the Cold War; changing technology; the spread of democracy.

We live in a world where isolationism has ceased to have a reason to exist. By necessity we have to co-operate with each other across nations.

Many of our domestic problems are caused on the other side of the world. Conflict in the Balkans causes more refugees in Germany and here in the US. These problems can only be addressed by international co-operation.

We are all internationalists now, whether we like it or not. We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure.¹⁰⁵

If the UN remained ambivalent on the NATO action, neither authorising nor condemning it (and subsequently endorsing it), the ideological shift can be identified in the words of Secretary General Kofi Annan:

State sovereignty... .. is being redefined. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.¹⁰⁶

There was a growing recognition, then, not only that the institutions established by the Charter for maintenance of international peace and stability were proving inadequate, but that conceptually a paradigm set against the context of inter-state war as the fundamental threat to peace was inadequate for a world in which the major threats were intra-state violence and complex emergencies. The inability of the UN to act made it necessary for states to do so on their own initiative, without necessarily seeking UN approval.

A growing inclination to ‘humanitarian intervention’ was at odds with fundamental principles of the legalist paradigm. This is nowhere better illustrated than in the findings of the Independent International Commission on Kosovo:

The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.¹⁰⁷

The issue of humanitarian intervention and how it might fit within a moral framework based on just war will be considered in detail in Chapter 3.

The final blow to the legalist paradigm, however, has not been the move towards humanitarian intervention, but its inadequacy for dealing with the perception of new threats as a result of the terrorist atrocities in New York and Washington on 11 September 2001. For that gave rise to a new claim to the right not just of anticipatory (or pre-emptive) but ‘preventive’ self defence: the elimination of threats before they developed, and a renewed unilateralism, most particularly in the United States. (The issue of pre-emptive and preventive action will be examined in detail in Chapter 3). The principles of this were expounded by US President George Bush in his 2004 State of the Union address to Congress:

Some critics have said our duties in Iraq must be internationalized.
From the beginning, America has sought international support for our operations in Afghanistan and Iraq, and we have gained much support. There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. **America will never seek a permission slip to defend the security of our country.**¹⁰⁸ (Emphasis added)

It was further articulated by British Prime Minister Tony Blair¹⁰⁹ in a speech delivered in his Sedgefield constituency in March 2004 addressing the continued threat of global terrorism and the ongoing controversy over the decision to go to war in Iraq. Firstly he accepted that the threat from Iraq had been neither direct nor imminent (which would have made the US-led action one of anticipatory self-defence and may well have fallen under the terms of Article 51): ‘I agree I cannot say that this month or next, even this year or next he (Saddam Hussein) will use his weapons. Had we believed Iraq was an imminent direct threat to Britain, we would have taken action in September 2002; we would not have gone to the UN.’ Of the lack of clarity of international law, he noted: ‘It is said this (the Attorney General’s) opinion is disputed. Of course it is. It

was disputed in March 2003. It is today. The lawyers continue to divide over it – with their legal opinions bearing a remarkable similarity to their political view of the war.’ However, the most striking aspect of the speech is the emergent view of international affairs:

Already, before September 11th the world's view of the justification of military action had been changing. The only clear case in international relations for armed intervention had been self-defence, response to aggression. But the notion of intervening on humanitarian grounds had been gaining currency. I set this out, following the Kosovo war, in a speech in Chicago* in 1999, where I called for a doctrine of international community, where in certain clear circumstances, we do intervene, even though we are not directly threatened.

So, for me, before September 11th, I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it and you don't interfere unless it threatens you, or breaches a treaty, or triggers an obligation of alliance.

... ... From September 11th on, I could see the threat plainly. Here were terrorists prepared to bring about Armageddon. Here were states whose leadership cared for no-one but themselves; were often cruel and tyrannical towards their own people; and who saw WMD as a means of defending themselves against any attempt external or internal to remove them and who, in their chaotic and corrupt state, were in any event porous and irresponsible with neither the will nor capability to prevent terrorists who also hated the West, from exploiting their chaos and corruption

... ... The global threat to our security was clear. So was our duty: to act to eliminate it.

... ... It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?

... ... The doctrine of international community is no longer a vision of idealism. The best defence of our security lies in the spread of our values.

But we cannot advance these values except within a framework that recognises their universality.

* See Page101.

This far-reaching speech contains some critical ideas: of a right to humanitarian intervention; of a right to unilateral military actions of preventive defence; of a right to ignore international law when that law is perceived to be no longer appropriate; and reiteration of a traditional liberal crusading view of peace and security through the spread of liberal values (as discussed in Section 1.1.2). The merits of these views are not for consideration here, though they will be discussed in the context of just war in the next chapter; the issue here is the challenge they represent to the legalist paradigm; and that is unambiguous.

Both Kosovo and Iraq (2003) serve as clear examples of the determination of States to act without specific UN authority when they believe that the UN has been/would be ineffective. The renewed hope in the UN Charter paradigm, triumphantly heralded after the successful action of collective security in the 1991 Gulf War, has given way progressively to renewed doubts about the adequacy of the international legal apparatus for constraining use of force, and renewed claims by states of sovereign authority over such decisions. The UN Charter paradigm, in a strict legalist interpretation, has failed. Phillip Allott, Professor of Public International Law at the University of Cambridge, has welcomed the public debate over the ‘legality’ of the war in Iraq but argued that it has been based on a widespread misunderstanding of the nature of international law. The debate to be had, he has argued, was not a legal one but a moral and political one.¹¹⁰ This thesis will later argue that if moral and political debate is to be had, then the just war approach has a part to play in framing the argument. However, first it is necessary to consider why justification is needed at all and that will be the task of the remainder of this chapter.

2.3 Why Justification?

The next three sections will seek to make the case for the continued importance of justification for resort to armed conflict and for just conduct within it. It will do this by considering the impact – at three levels – when cause or conduct are not universally, or at least widely, regarded as just. Primary focus will be on the 2003 US-led invasion of

Iraq as the most recent and, since the 1956 Suez expedition, most controversial such operation conducted by Western states. It is not the purpose of this thesis to argue that the conflict was or was not just, simply to use it as an example of a conflict that falls well short of universal recognition as justified. That more than four years from President George Bush's declaration of the successful completion of major combat operations¹¹¹ the controversy continued to feature large in the media and in domestic politics on both sides of the Atlantic, is testament enough to the failure of either the US Administration or the UK Government, as its principal ally, to make the case convincingly and conclusively to either an international or a domestic audience. That most nations, including three of the five Permanent Members of the Security Council, were opposed to the action, and that the Secretary-General of the UN has described it as 'illegal'¹¹², lends further weight to its use as an example of a war lacking widespread acceptance as 'just'. To offer but one example of its standing in intellectual circles, David Newsome, former US Ambassador to Libya, Indonesia and the Philippines, Under Secretary of State, and Professor of International Studies at the University of Virginia, pointed out in late 2003 – well after the end of 'major combat operations' – that 'the latest edition of the journal Foreign Affairs contains at least five articles critical of the justification for war and the treatment of allies.'¹¹³ The contrast with the widespread acceptance of the justification of the 1991 Gulf War is stark.

Whilst the focus, then, will be on the 2003 Iraq war, examples from other conflicts throughout history will be used where they can assist in illustrating a point. Three levels of analysis will be used: the international, the national and the individual. Whilst this provides a structure to the argument, it must be understood that in reality the levels interact with one another and do not have distinct boundaries. If, for example, a perception of injustice of a conflict at the individual level deters the recruiting or retention of a nation's reserve forces, this clearly impacts on policy at the national level, which in turn nuances a nation's ability to engage in alliances and coalitions at the international. Such interaction is encapsulated by Michael Elliott in *Time* magazine:

As it becomes clear that there will not be a sudden influx of non-American troops into Iraq, the Pentagon is having to extend the tours of duty there of regular soldiers and reservists. Bush's travails have invigorated the Democratic Party; all the Democrats running for the White House make criticism of Bush's record in Iraq a part of their pitch. And although few are brave enough to say it,

other world leaders – most of whom opposed the war – can hardly hide their sense that the Bush Administration is getting what it deserves.¹¹⁴

2.3.1 Relevance at the International Level

Realists might argue that a nation needs no other justification than its own national interests to engage in war and, moreover, should be constrained in its actions therein no more than is necessary to ensure reciprocal restraint by the enemy. President George W Bush's 'America will never seek a permission slip to defend the security of our country' (see p96) is redolent of the first of these arguments. (Indeed first reports in *The Washington Post* of his speech – perhaps produced from a pre-delivery press release – used the term '**interests** of our country'). The refusal of both the Clinton and Bush Administrations to sign the Ottawa Treaty banning Anti-Personnel Landmines, at least hints at the second. Such a stance, even from a realist perspective, can only be taken from a position of strength – indeed such a lack of concern for the views of other nations was summed up by General BB Bell, Commander US Army Europe (USAREUR) giving the Kermit Roosevelt Memorial Lecture at the UK Joint Services Command and Staff College in 2003. Explaining US attitude to European concerns over the war in Iraq, he argued that the US would prefer to have allies but if it could not carry a consensus then 'we don't care' – a phrase reiterated throughout both his presentation and his response to questions.

It is increasingly argued, however, that in the modern world, such robust unipolarity is a luxury that even the US, as the world's sole remaining superpower, cannot afford. Thomas Franck is Professor of Law and Director of the Law Center for International Studies at New York University. Speaking at the conclusion of what George Bush termed 'major combat operations' (see p105) but before the emergence of substantial 'post-conflict' resistance that was to cost significantly greater casualties, he noted the temptation after the success of US military action in Afghanistan (contrasted with the Soviet Union's failure in the 1980s) and in Iraq to 'sympathize with, and even applaud, their (America's) leaders' contempt for international law, which they now openly derided as a toll by which the weak seek to inhibit the prerogatives and virility of the powerful.'¹¹⁵ Franck's conclusion, though, is that:

(u)nipolarity – the myth of America as the omnipotent world power – is the snake oil of contemporary foreign policy discourse. Like snake oil it claims to be a cure for all manner of disease, the cause of which its concoctors do not even begin to understand and which the snake oil itself does nothing to ameliorate. ...

...

... Whatever the military preponderance we currently enjoy, it is not indicative of its indispensable concomitant: economic and fiscal preponderance. And, by itself, without a solid economic, fiscal and social base, unipolarity is a dangerous delusion.

Even those who view unipolarity as a good thing can be warned that unilateral action may not be the best way to sustain it. Arguing the case for ‘liberal realism’ in the leading realist journal, *The National Interest*, John Ikenberry and Charles Kupchan counsel that ‘(t)he quickest way to end unipolarity is to pursue unilateralism’ whilst ‘(a)n America that obeys international rules will strengthen its foundation of power and preserve its advantage.’¹¹⁶ The issue of preserving hegemony will be developed further below.

The dangers of unilateralism were also highlighted by former UK Foreign Secretary Robin Cook in explaining his resignation from the Cabinet* in protest at the UK Government’s decision to join the US in taking military action against Iraq in 2003 without the backing of an explicit UN mandate (the so-called ‘Second Resolution’):

The reality is that Britain is being asked to embark on a war without agreement in any of the international bodies of which we are a leading partner – not NATO, not the European Union and, now, not the Security Council.

...Our interests are best protected not by unilateral action but by multilateral agreements and a world order governed by rules.¹¹⁷

In particular, Cook pointed to the damage that had been done to the informal coalition of consensus in tackling the threat of international terrorism, which had coalesced so quickly after the devastating attacks on the World Trade Centre in New York and on the

* He was no longer Foreign Secretary at the time but held the Cabinet-ranked post of Leader of the House of Commons.

Pentagon on 11 Sep 2001. He said: ‘Only a year ago, we and the United States were part of a coalition against terrorism that was wider and more diverse than I would ever have imagined possible.’¹¹⁸ Lack of clear and widely perceived justification, then, had shattered the consensus – across a broad geographic and cultural spread – that was essential in the fight against international terrorism. This theme was followed eighteen months later as controversy over the war continued unabated and Iraq, liberated from the Saddam regime, remained in turmoil and an apparent centre of gravity for anti-Western terrorism. In an interview with *The Daily Telegraph* Saudi Ambassador to London, Prince Turki al-Faisal, argued ‘(t)here is no doubt that as a result of the Iraq war it is easier for al-Qa’eda to sell their point of view to potential recruits. Al-Qa’eda has become stronger and more active since the Iraq conflict.’¹¹⁹ Of course, the increased al-Qa’eda activity may have occurred regardless of the justification, or perceived justification, of the conflict. It is the ability of the organisation to ‘sell their point of view’ that resulted from the widespread perception, most especially among al-Qa’eda’s natural recruit population of young Arabs, of the war’s lack of justification. In September 2004 British newspapers reported similar views expressed by the UK Ambassador to Rome, Sir Ivor Roberts. According to *The Guardian*, Sir Ivor ‘described President George Bush as “the best recruiting sergeant ever for al-Qaida”’¹²⁰ and noted that the Foreign Office had warned before the war that ‘Iraq could become a breeding ground for Al-Qaida.’

Issues of *jus in bello*, too, have an impact on international standing. In April 2004 a group of more than 50 former British diplomats (including such leading figures as Sir Marrack Goulding, former UN Under-Secretary-General for Peacekeeping, and Sir Crispin Tickell, former UK Ambassador to the UN), signed an open letter to the Prime Minister criticising British and US policy in Iraq and the wider Middle-East. Foremost amongst their criticisms was not the decision to go to war but the nature of its conduct:

The conduct of the war in Iraq has made it clear that there was no effective plan for the post-Saddam settlement.

...

The military actions of the coalition force must be guided by political objectives and by the requirements of the Iraq theatre itself, not by criteria remote from them. It is not good enough to say that the use of force is a matter for local

commanders. Heavy weapons unsuited to the task in hand, inflammatory language, the current confrontations in Najaf and Fallujah, all these have built up rather than isolated the opposition.¹²¹

Two themes emerge from this letter, both common throughout criticism of the Iraq war. Firstly, there is an argument that echoes Aristotle, Cicero and Augustine (see Section 1.2.1) and is summarised thus by Sir Michael Howard: ‘War is instrumental not elemental: its only legitimate object is a better peace.’¹²² If the justification for the Iraq war was a better peace, and there is plenty of evidence of that line of justification in the statements of both the American and British Governments, then proper consideration of the requirements for building that peace should have been fundamental to the preparations for war. Just war doctrine requires such consideration in its requirement for ‘right intent.’ Had such consideration been given and plans for the post-conflict reconstruction of Iraq been better implemented, then right intent would have been easier to argue and a considerable weight of criticism deflected. The argument is developed by Edward Luttwak¹²³ of the Center for Strategic and International Studies. Posing the question ‘How have the Americans, who liberated the Iraqis from Saddam, managed to make themselves so unpopular so quickly?’ he notes that to some extent the media portrayal of Iraqi opposition to coalition forces has been over-stated.

Still, there is no denying that the Americans are very unpopular in Iraq. There is one good reason for that unpopularity, which is that they have failed to discharge the first duty of an occupying force: to provide, and maintain, law, order and stability.

The Americans have not been able to establish the rule of law because they simply do not have the troops in Iraq to do the job. The Bush administration’s estimates of how many men it would need to control Iraq once Saddam had been dislodged were wildly wrong.

Consideration of historical data on post-conflict stabilisation also suggests that a considerably greater proportion of peacekeepers to population is required. Again, a full consideration of right intent might have informed the campaign planning process and led to a more appropriate troop strength which, in turn, might have more quickly stabilized the country post-conflict and prevented much of the on-going international unease. As Luttwak concludes ‘(h)ad the Americans deployed troops in sufficient numbers ... they could have curtailed the problem posed by Sunni guerrilla violence.

The scale of the disorder now on show in parts of Iraq is a direct consequence of President Bush's misjudgement on that issue.^{124*}

Francis Fukuyama takes up the theme of gaining legitimacy through demonstrating right intent and achieving positive results. Despite being regarded, and regarding himself, as firmly in the neo-conservative camp of US foreign policy commentators, Fukuyama has argued that the Bush Administration got the war in Iraq wrong. Speaking in August 2004, he stressed the importance of legitimacy. A key argument of his speech was summarised thus, in *The National Interest*:

If other peoples believe that the American role in the world is legitimate, they will cooperate. Certainly, global institutions such as the United Nations can be corrupt or nonrepresentative, but seeking a mandate from the United Nations, NATO or other international bodies can be a pragmatic way to form true, meaningful coalitions. (I)t is dangerous for the United States to assume that when it acts others will automatically grant a seal of approval to any step taken by Washington.

.....(L)egitimacy will be accorded to the extent that American actions lead to a positive track record. But when things go wrong, as they have in Iraq – where warnings from others about the difficulties of postwar reconstruction or doubts about the real threats posed by Iraq – then any future administration must undertake the task of repairing American credibility.¹²⁵

Luttwak's second issue relates more to the operational conduct of the war, an issue that has caused not only international criticism and, as argued by the former diplomats, a hardening of resistance, but also friction between the leading coalition partners. In April 2004 there was a flurry of newspaper articles in the UK contrasting the US and UK approaches to security in Iraq. *The Daily Telegraph*, for example, quoted an anonymous senior British officer as saying that US aggressive tactics were 'causing friction among allied commanders and a growing sense of "unease and frustration" among the British high command.'

My view and the view of the British chain of command is that the Americans' use of violence is not proportionate and is over-responsive to the threat they are facing. They don't see the Iraqi people the way we see them. They view them as untermenschen. They are not concerned about the Iraqi loss of life in the way the British are.¹²⁶

* In part this stems from over-reliance on technology-dominance, which will be considered in Chapter 4.

This tension between approaches appeared to be borne out by the UK's Chief of the General Staff, General Sir Mike Jackson, appearing before the House of Commons Defence Select Committee.¹²⁷ General Jackson acknowledged the difference in doctrine and style – the US concentrating on ‘force protection’ whilst the UK took greater risks in order to present a softer and more approachable stance post-conflict: ‘...(W)e must be able to fight with the Americans. That does not equal we must fight as the Americans.’ On the other side of the Atlantic, too, the disparity of approach and the friction that resulted was noted.¹²⁸

The issues here relate to a perceived ‘heavy-handedness’ of approach that called into question both proportionality and discrimination. It went further in that; if ordinary Iraqis were regarded as ‘enemy non-combatants’ in a traditional war-fighting sense, then part of the *jus ad bellum* of the conflict – rescue of the Iraqi people from a tyrannical regime – was also undermined. Moreover, there was a practical fall out, too. The friction created by a fundamentally different approach to the conduct of post-conflict operations complicated coalition cooperation. For instance, in October 2004 when the US requested the transfer of the UK's 1st Battalion The Black Watch Battle Group (1 BW) from the UK-controlled sector around Basra to assist with a major US operation around Fallujah, a political storm broke in the UK, in part because of a perceived link to the US Presidential election and in part because the dangers the battle-group was expected to face in the new area of operations were considered to have been heightened by the US approach to peacekeeping. The following quotations represent concerns expressed to the Defence Secretary by MPs on both sides of the House of Commons¹²⁹:

Joan Ruddock (Lewisham, Deptford) (Lab): Will my right hon. Friend accept that there is a clear perception—among those, such as me, who opposed the war and those who supported it—that British troops have been more intelligently and sensitively led in Iraq than the US forces? At a time when two thirds of Iraqi civilians who are killed die at the hands of the coalition, is not this the time to review the conduct of the war rather than to place British forces, which have done a fantastic job in their own way, under the command of the US?

Mr. Iain Duncan Smith (Chingford and Woodford Green) (Con): I am one of those who continue to support the war Will the Secretary of State explain how our different approach will not end up creating huge problems for us in the conduct of operations under the command, or associated command, of the Americans?

Mr. Robin Cook (Livingston) (Lab): Will my right hon. Friend confirm that it is the restraint that has been shown by British troops in peacekeeping that has earned them respect among the Iraqis? Will it really be possible for them to maintain that restraint if they are deployed to a US sector that has been policed for more than a year by US forces who have not shown the same level of restraint? Does my right hon. Friend recall that the last time US forces besieged Falluja, they left Iraq in uproar over the many civilian casualties? In assessing the request, will he consider carefully the risk to British troops, in that if they free up US forces for the next attack they may be seen by some Iraqis as equally responsible for civilian casualties over which neither he nor they will have any control whatever?

Mr. Kenneth Clarke (Rushcliffe) (Con): Does the Secretary of State accept that the difference between the British and American approaches to peacekeeping is not just a question of defending themselves against attack—British troops are just as robust in defending themselves against direct attack as any of their allies—but involves an approach to peacekeeping based on trying to keep the support of all the favourably disposed, non-insurgent civilian population? As the latest deployment is plainly intended to facilitate a further assault on Falluja, will the Government take the opportunity to try to exercise more influence on the Americans in their conduct of operations? In particular, will they stress the need to ensure that the force used is proportionate to the threat that is definitely known, and that action is conducted on a basis that minimises the threat to civilians and reduces the amount of air and artillery attack on densely populated areas of a city?

In addition to causing tension between allies, by undermining the case for the coalition as rescuers, a lack of attention to just conduct also hardened resistance. If an apparent disregard for civilian losses provided the background to this issue, the abuses of prisoners – both real and imagined – brought it into sharp relief. Claims of abuses of prisoners of the US military at Abu Ghraib Prison emerged over the spring of 2003. These were backed by pictures, examples of which are shown in Figure 2-1 and Figure 2-2¹³⁰. They led to the Court Martial of several US military personnel^{*} and high-level investigations to try to determine if the abuses were the result of individual malpractice, or systematic policy. There were subsequent allegations about detainees of British forces and pictures were published in *The Daily Mirror* that were eventually exposed as fakes leading to the sacking of the *Mirror*'s editor, Piers Morgan[†]. There can be no

^{*} In Jan 2005 Specialist Charles Graner, identified as a ring-leader of the abuse, was sentenced to ten years imprisonment.

[†] There were further, proven, allegations involving British forces, which resulted in convictions by Court Martial.

doubt that the Abu Ghraib pictures, in particular, but also the false allegations in the *Mirror*, harmed the international image and reputation of coalition forces. It also had a devastating effect on the campaign to win over ordinary Iraqis whilst at the same time handing a propaganda victory to the insurgents opposed to the coalition and the new Iraqi regime it was attempting to install. A spate of kidnappings and executions of Western civilians followed, invariably linked to calls for the release of prisoners and the ending of abuse of detainees. Jack Fairweather of *The Daily Telegraph* reported that

(t)he images, and hundreds like them, can be found everywhere in Iraq. They are available on the internet, on video and DVD at market stalls and as mass-produced flyers. ... In Iraq's deeply conservative society the effect of the images has been to fuel a level of hatred against foreigners that makes kidnap and murder a ready response.

Anger at the images has boosted support for insurgent groups such as Zarqawi's Tawhid and Jihad that were previously viewed with horror by most Iraqis. It has also blurred the demarcation between US troops and western civilians, making kidnappings a simpler, acceptable alternative to attacks on armed soldiers. "We see only ajnabi (foreigner) now," said one Iraqi businessman.¹³¹



Figure 2-1: Hooded Iraqi Prisoner attached to mock electrodes



Figure 2-2 PFC Lynndie England with leashed Iraqi prisoner

So iconic was to become the picture at Figure 2-1 that following President George Bush's re-election victory, the UK's *Daily Mail* carried it as part of a photo montage under the banner headline 'Four More Years'.¹³²

There is, of course, nothing new in unjust conduct by armies, either as deliberate policy or resulting from the unofficial and ill-disciplined act of a small minority, having huge impact at the international level. The action of British troops at Lexington and Concord in 1775, and the deliberate burning first of Falmouth MA and then Norfolk VA, did much to turn the American Revolution from a localised rebellion into a war of independence. In 1919, the murderous action of Brigadier-General Dyer in Amritsar's Jallianwallah Bagh helped turn millions of peace-loving, patient and loyal supporters of the Raj into national revolutionaries.¹³³ In 1972 the over-reaction of British troops in Northern Ireland to provocations during an illegal Civil Rights Movement march, undoubtedly had the effect of hardening republican opinion, damaging Britain's international standing and aiding the recruiting efforts of the Provisional IRA. Similarly, rebels, insurgents and terrorists have sometimes provoked a greater back-lash than they intended by acts of particular atrocity. The Omagh bombing in 1998 seriously undermined support for the Irish republican paramilitaries both at home and abroad. In 2004 the massacre of children at a school in Beslan, Russia, did serious harm to the international sympathy for the Chechen cause.

The point has already been made that even a country as powerful as the US can rarely afford to act entirely alone. Building a coalition, though, especially for war, with all the inherent potential and actual costs in treasure, lives and international reputation is no easy business. It must rest, to a considerable degree, on a shared perception of the rightness of the cause and, as the discussion above has highlighted, some shared standards to be applied to the execution. In their case study of the 1991 Gulf War, Bennett, Lepgold and Unger¹³⁴ hypothesise a series of external drivers for contribution to a coalition, and internal (domestic and bureaucratic-political) factors which may be seen to act as restraints. A significant factor in restraint, though limited in its degree of effect by the level of autonomy the executive enjoys relative to civil society, is public opinion. Bennett et al suggest that in the 1991 conflict the need for stability in oil prices and the principle of inviolability of borders were both issues of ‘public goods’ that were among the drivers for contribution to the coalition. The first of these might be seen as a traditional ‘national interest’ argument but the second is clearly one of international moral principle; appeal to these – but more so the latter – played a key part in overcoming any domestic resistance there might otherwise have been to the use of armed force. In 2003, despite attempts to appeal both to threat and then to the upholding of international legal norms, the case for war was far less convincing and the coalition created was correspondingly smaller. In 1991 it was the breadth of the coalition, and not simply its numbers, that made it so impressive as a statement of international resolve; in 2003, significant contribution to the US effort was limited to the UK and Australia.

The failure of the US to garner wider support for its coalition – particularly in contributions of troops on the ground – created a significant military burden for both the US and the UK, most especially in the post-conflict^{*} phase. The extent of the ‘overstretch’ was highlighted in September 2003 – some 5 months after the cessation of ‘major combat operations’ when the US had approximately 150,000 troops deployed in Iraq (but a total of over 180,000 when those in neighbouring countries and directly

^{*} That is post cessation of ‘major combat operations’; actual conflict in the form of significant insurgent operations has continued unabated and caused significantly more casualties than the ‘combat’ phase.

associated with operation in Iraq are included), equating to roughly one third of its total military manpower strength. The Congressional Budget Office at that time estimated that the US Army would be 'unable to sustain an occupation force of the present size beyond about March 2004 if it chose not to keep individual units deployed to Iraq for longer than one year without relief (an assumption consistent with DoD's current planning).'¹³⁵ It further assessed that beyond the winter of 2004-2005, only an occupation force of no more than 38,000 to 64,000 could be sustained without significant additional call-ups of reserves. The estimated cost associated with this level of sustained commitments was \$8 billion to \$12 billion per annum. At the same time the UK Foreign Office was, according to British newspaper reports, urging the deployment of greater troop numbers to counter the growing insurgency.¹³⁶ Consequently, in what was widely seen as a climb-down by the Bush Administration, the US was forced to seek a UN mandate for Iraq's occupation and with it the contribution of forces by a wider coalition.¹³⁷ US commentators, too, have argued that the nature of the case made for the Iraq war both turned away potential contributors and undermined the consensus behind the US's wider strategy in its perceived 'war against global terror.' E J Dionne Jr, writing in *The Washington Post*¹³⁸ argued that using

the tactics of a political campaign to sell the war in Iraq(had) turned off potential allies abroad. A war supported by straightforward arguments and based on a broad alliance, patiently constructed, could have united our nation and much of the world on behalf of democratic ideals. Instead, ... the consensus brought into being by 9/11 has been shattered.

In the 2004 US Presidential election campaign it was an issue taken up by the Democrats who highlighted not only the lack of broad international support but the continued diminution of the coalition as the security situation failed to stabilize.¹³⁹ The issue re-arose, as was discussed above, in November 2004 when the US requested the move of the UK's 1 BW Battlegroup to support its operations around Fallujah.

The issues discussed above have all been broadly practical or realist considerations; there is also a more idealist argument that an international order that limits the use of force as an instrument of policy is simply 'better' than one that does not. As Francis Fukuyama has argued in relation to the Iraq war:

a very large part of the world, including many people who are normally inclined to be our friends, did not believe in the legitimacy of our behaviour towards

Iraq. This is not because the Security Council failed to endorse the war, but because many of our friends did not trust us, that is, the Bush Administration, to use our huge margin of power wisely and in the interests of the world as a whole. This should matter to us, not just for realist reasons of state (our ability to attract allies and share the burden), but **for idealist ones as well (our ability to lead and inspire based on the attractiveness of who we are).**¹⁴⁰ (Emphasis added)

So consideration of what is simply morally right can offer both idealist and practical advantage, too, which states would do well to consider. This is the notion of moral authority as a source of power – not perhaps on par with economic or military resources, but nevertheless a power resource in its own right. Such an argument is made by Rodney Hall¹⁴¹. Following Alexander Wendt's constructivist argument that interests must be defined in terms of the identities of the actors, Hall notes that power resources can only be understood in the context of 'a situationally specific or historically contingent structure of coconstituted identities and interests.'¹⁴² Thus, just as 'the ability of military power resources relies on the capacity to credibly threaten their use,'¹⁴³ so moral authority is a power resource only in the context of an international system which ascribes value to it.

Hall draws the empirical evidence for the foundation of his argument from feudal Europe but points, too, to the emergence of 'transnational moral authority' as a power resource in the Twentieth century. Woodrow Wilson justified the United States' entry into the First World War to "make the world safe for democracy"¹⁴⁴; during the Cold War, the West drew upon the moral authority of the principle of 'self determination', whilst the Soviet bloc claimed a duty to the cause of the international proletariat. The continued relevance of transnational moral authority today can be deduced from the regularity with which the world's leaders continue to appeal to it – justifying action by reference to 'Western values', 'freedom', 'democracy' or 'universal human rights'.¹⁴⁵

In taking the decision to attack Iraq in 2003 without international backing, President Bush might be seen to place a lesser regard on moral authority, but even so there was much reference to 'making the world a safer place', to 'freeing the Iraqi people' and 'bringing democracy to the Middle East'. As Suzanne Nossel notes, '(a)fter September 11, conservatives adopted the trappings of liberal internationalism, entangling the

rhetoric of human rights and democracy in a strategy of aggressive unilateralism.’¹⁴⁶ All of this suggests that the notion of moral authority still holds considerable sway even with a strongly realist-leaning US Administration. It was clearly an even more important issue for Tony Blair – though perhaps more to meet domestic political imperatives than to retain international moral standing – hence his preparedness to ‘go the extra mile’ for the so-called ‘second’ UN Resolution even though, eventually, he was prepared to go to war without it.

Hall is careful to observe the importance of context: ‘moral authority – like money or the credible threat of military force in a conventionally anarchic system – acquires utility as a power resource to the extent that it is institutionalized as a convention(;) when it becomes socially embedded in a system of actors whose social identities and interests impel them to recognize it as a power resource’¹⁴⁷. However, he notes that resort to force was ‘usefully unproblematic’ when there was no convention against it. The corollary to this is that if today’s conventions against use of force are undermined – as they appear in danger of being – then we risk return to an international order in which moral authority carries no value and censure against use of force is ineffective; and that begins to tend towards the world of Hobbes.

Joseph Nye has taken the lead in developing the concept of moral authority into that of ‘Soft Power’ which he defines as ‘the ability to attract others by the legitimacy of ... policies and the values that underlie them’ which contributes to the ability to ‘achieve ... goals without resorting to coercion or payment.’¹⁴⁸ Noting the success the United States enjoyed after the Second World War in drawing others into an enduring system of alliances by utilising a combination of both soft and hard power, Nye expresses concern that many current US policies undercut soft power, tending to enhance rather than reduce the inevitable antagonisms and resentment that arise from America’s dominant position in world affairs. Yet the particular threats associated with the rise of international terrorism can only be met through cooperation with other countries. Whilst self-interest will motivate other countries to cooperate, the extent of their cooperation depends on the ‘attractiveness’ of the United States. By contrast ‘(w)hen the United States becomes so unpopular that being pro-American is a kiss of death in

other countries' domestic politics, foreign leaders are unlikely to make helpful concessions.....And when U.S. policies lose their *legitimacy* in the eyes of others, distrust grows, reducing U.S. leverage in international affairs.'¹⁴⁹ (Emphasis added). The legitimacy, in particular, of US leadership and dominance is exactly what came to be strongly contested as a result of the 2003 Iraq War. Robert Kagan argues that it is

precisely the question of legitimacy that divides Americans and Europeans today – not the legitimacy of each other's political institutions, perhaps, but the legitimacy of their respective visions of world order. More to the point, for the first time since World War II, a majority of Europeans has come to doubt the legitimacy of U.S. power and of U.S. global leadership.¹⁵⁰

It is easy to see, then, that legitimacy in the deployment of hard power, especially its military form – essentially *jus ad bellum* and *jus in bello* – will directly impact on soft power. Richard Bernstein of *The New York Times* made precisely this point in an editorial marking the second anniversary of the September 11 attacks: 'In the two years since Sept. 11, 2001, the view of the United States as a victim of terrorism that deserved the world's sympathy and support has given way to a widespread vision of America as an imperial power that has defied world opinion through unjustified and unilateral use of military force.'¹⁵¹ Similarly, another eight months later, Thomas Friedman was to argue the need for America to restore its honour 'because never has the United States and its president been so hated around the world as today.'¹⁵²

As a side-issue, but closely related to this, it is worth considering the impact on American preparedness to take the lead in future; the difficulties encountered as a result of the Iraq war – internationally but also domestically – not to mention the cost, both material and in US lives, might risk a US return to relative isolationism which could be as disadvantageous to the world as US unilateralism. Matthew Parris suggests that wrongful intervention

has besmirched, by misapplication, a decent philosophy of muscular great-power diplomacy of which the civilised world may have future need.

The horrors and mistakes of the First World War contributed mightily to the reluctance to fight another, feeding the mood for appeasement. The shame of the Holocaust may have dulled moral sensibilities to the mistakes Israel is making in the Middle East. The collapse of America's calamitous engagement in Vietnam frightened a generation in the West off the more interfering approach we should have taken to sinister or corrupt forces developing in the Third World.¹⁵³

In this context it is worth pondering whether, had the Iraq war not taken place, Western nations might have felt more minded to intervene to prevent what the US recognised as genocide in Darfur in 2004.^{154*}

The final issue to consider, from the international perspective, is that of hegemonic leadership. It was suggested in Chapter 1 (see p61) that it pays any hegemon, however powerful, to act in such a way as to minimise challenges to his hegemony. For, as the Italian Marxist Antonio Gramsci noted, the distinction between hegemony and domination is that the former is based on consent and the latter on coercion.¹⁵⁵ G John Ikenberry notes:

The Bush Administration's war on terrorism, invasions of Afghanistan and Iraq, expanded military budget, and controversial 2002 National Security Strategy have thrust American power into the light of day – and, in doing so, deeply unsettled much of the world.

... ..

Power is often muted or disguised, but when it is exposed and perceived as domination, it inevitably invites response.¹⁵⁶

This relates closely to what has been argued above about the importance of perceived legitimacy, today, of US leadership and global dominance. It follows from the above discussion of soft power, that hegemonic leadership is dependant not only upon economic and military dominance (hard power) but on perceived legitimacy and moral authority.

In part this is about trust, as has been argued above. During the 2004 US Presidential election campaign, Democratic challenger Senator John Kerry drew attention to how, in his view, the Bush administration had undermined that in engaging in a pre-emptive attack on Iraq in 2003 without a proper justification:

I believe America is safest and strongest when we are leading the world and we are leading strong alliances.

... ..

No president, through all of American history, has ever ceded, and nor would I, the right to preempt in any way necessary to protect the United States of

* A fuller discussion on humanitarian intervention is undertaken in Chapter 3.

America. But ... you have to do it in a way that ... your people understand fully why you're doing what you're doing and you can **prove to the world that you did it for legitimate reasons.**

Here we have our own secretary of state who has had to apologize to the world for the presentation he made to the United Nations.

...(W)hen President Kennedy in the Cuban missile crisis sent his secretary of state to Paris to meet with DeGaulle ... to tell them about the missiles in Cuba, he said, "Here, let me show you the photos." And DeGaulle waved them off and said, "No, no, no, no. The word of the president of the United States is good enough for me." How many leaders in the world today would respond to us, as a result of what we've done, in that way? So what is at test here is **the credibility of the United States of America** and how we lead the world.¹⁵⁷ (Emphasis added)

Former National Security Adviser Zbigniew Brzezinski had made similar observations when asked, during a debate to mark the first anniversary of the Iraq war, whether the war had made America more or less secure:

On balance, I would have to say, and with genuine sadness, less secure. I think we have increased the number of enemies. The global antagonism towards the United States is much higher than before. International mistrust of the United States is at unprecedented heights. And the United States is more isolated internationally than probably at any point in its history.

... I suppose American power is more respected but then you have to count against that, first of all, the loss of life...(and) continued costs -- they're escalating, both in blood and money. But above all else, **the loss of American credibility**, both at home and abroad, is something that's very serious. The fact that the **President of the United States is no longer trusted and his word is not taken to be America's bond** is a serious development. It **detracts from our power.**

... ..

You cannot be leading if you are misleading. And that is just a fact of life. Democracy is based on trust, on the covenant between the people and the president. **An international alliance of democracies is based on trust.**

... ..

The fact is that our credibility has been hurt.¹⁵⁸ (Emphasis added)

Credibility and trust matter in confirming the leadership of a hegemon. Returning to the issues of legitimacy and soft power in ensuring unchallenged leadership, Joseph Nye

Chapter 2: The Requirement for Ethical Justification

argues that whilst the first Gulf War was widely regarded as legitimate, the more recent one was contested.

Unable to balance American military power, France, Germany, Russia, and China created a coalition to balance American soft power by depriving the United States of the legitimacy that might have been bestowed by a second UN resolution. Although such balancing did not avert the war in Iraq, it did significantly raise its price.¹⁵⁹

Because Turkey did not recognize the war as legitimate it refused to facilitate an invasion from the North, through its territory, which impacted on US ability to wield its hard (military power). Of course, Turkey had another key motive, in the Kurdish question, but this notwithstanding it is difficult to imagine Turkey so robustly challenging US hegemony, had there been more widespread, and especially NATO and European, support for the US position. A failure of credibility and legitimacy, then, detracted from hegemonic leadership. It is worth noting here, that legitimacy can be damaged, if not destroyed, by a challenge alone – regardless of the validity of the challenge, or legitimacy of the challenger(s); it is the challenge, not the source, that matters.¹⁶⁰

In summary, then, even a strong power must exercise restraint in the occasions and manner of its use of force. In short, it must use force when there is a broad acceptance of its justification for so doing, and its forces must act justly. To breach either of these restrictions is to undermine international standing. This both impacts on the ability to gather together international coalitions of support, which even the most powerful nation requires for sustained military operations, and it impacts on a nation's international authority. Moral Authority is undermined and legitimacy questioned, in turn reducing the 'soft power' which in the complex modern world is a critical adjunct to traditional hard power. A distrusted hegemon risks challenge to its authority and leadership, increasing the material costs of its action, giving its position the appearance of coercive domination rather than cooperative hegemony and, in the long-term, putting that position at risk.

2.3.2 Relevance at the National Level

This section will examine why justification (in cause and conduct) matters at the national level. Of course, as was noted at the beginning of the last section, there is considerable overlap and interaction between the levels, but the focus of this section will be the how perceptions of justification/non-justification impact on domestic politics.

Going to war has often been used by governments as a way of diverting public opinion from an unsatisfactory domestic situation. This is an accusation that has been levelled at all types of administration. Indeed, some even accused George Bush of using the ‘War on Terror’ and subsequent attack on Iraq as a diversion from a faltering economy and government culpability for the September 11 terrorist outrages. But it is more often levelled at autocracies such as the Argentine military junta that ordered the 1982 military attack on the Falkland Islands. As that government found, success is critical. For a democracy, though, there is a greater issue. According to the Democratic Peace Thesis¹⁶¹, democracies are averse to war, generally, but are particularly unlikely to go to war with one another. The thesis is summarised thus by G John Ikenberry:

Scholars have identified a number of reasons for the general amity of democracies. They point out that elected legislatures and other democratic structures often limit the ability of leaders to mobilize societies for war, that the norms of peaceful conflict resolution that democracies develop at home carry over into foreign dealings, and that democratic institutions generate more honest and reliable information about government intentions than nondemocracies do. And because democracies are built on shared social purposes and a congruence of interests, these scholars add, such societies generally limit the rise of conflicts strong enough to lead to war¹⁶²

According to the thesis a democratic government must, then, choose its conflicts with great care. In a democracy it is not just success or failure that will determine support for a war; electorates will need to back the cause and this is likely to come down to essential – and obvious – national defence, or evident righteousness. There will always be some opposition. The UK saw domestic opposition to the Falkland Islands conflict, to the 1991 Gulf War, and to Kosovo. Such opposition, though, was muted (less so in the case of Kosovo) and made by so small a minority that it could be easily disregarded

by the Government. Indeed both the Falklands conflict and the 1991 Gulf War were widely held to have boosted the electoral prospects of the sitting government¹⁶³. The reason has to be the widespread acceptance that the conflicts were necessary, in the national interest and 'right' (again, opinion was much more divided about Kosovo but the campaign was relatively short and almost free from casualties to British forces – an issue that will always galvanise opinion). When the cause is not widely accepted then a war is likely to damage the governing party. The 2003 Iraq war provides plenty of illustration of this.

Perhaps the most obvious 'casualty' of this issue was the Spanish Government of Jose-Maria Aznar, a staunch supporter of the war and the first of the allies to face an election afterwards. The war had been deeply unpopular with the Spanish electorate – some polls suggested as great as 90% of the population opposed the war¹⁶⁴ – and was also, naturally, held as the primary reason that Spain had become a target for Al Qaeda terrorism. The Spanish general election was held in March 2004, a year after the war and just days after a devastating terrorist attack in Madrid. Aznar's ruling Popular Party (PP) government lost heavily to the socialist PSOE party (43% to 38% of the votes cast, with a 75% turnout)¹⁶⁵. The PSOE had been firmly opposed to the war and made the issue central to its campaign. Some elements of the Western media suggested this was a worrying development in that it represented the first incidence of Al Qaeda influencing a Western election result.¹⁶⁶ Others have suggested it was more a case of electoral antipathy towards the government's handling of the investigation into the terrorist attacks, in particular their apparent attempt to deflect blame onto the Basque separatist movement ETA¹⁶⁷. The higher than expected turnout would tend to support the view that the Spanish were defying the terrorists rather than bowing to them. It therefore seems reasonable to suppose, counterfactual hypothesis though it may be, that had there been widespread support for the causes of the war, the Spanish people would have been equally robust in defying the terrorists and voting for the PP.

In the UK, the consequences of the war were not as dramatic as in Spain but they were still significant for the Labour Government, and for Tony Blair as Prime Minister, in particular. Opposition to the war was significant, and far greater than in any conflict

since Suez, but not so overwhelming as in Spain. Yet still the decision to stand by the US decision to invade Iraq, and indeed to be a major troop contributor to the coalition, did great damage to the ruling Labour party. Its first electoral test came in June 2004 with local government elections in which Labour were forced into an unprecedented third place, with just 26% of the vote^{*} behind the Conservatives with 37% and the Liberal Democrats (the only main party firmly to oppose the war) with 27%¹⁶⁸. For Labour this resulted in a net loss of 463 seats and control of 8 councils. Deputy Prime Minister John Prescott acknowledged that the war in Iraq[†] was a significant factor, ‘a cloud, or indeed a shadow, over these elections.’¹⁶⁹ Similarly Prime Minister Tony Blair said that ‘Iraq and worries over Iraq have been a shadow over our support.’¹⁷⁰ The principal factor identified by many commentators was the view that the government had been dishonest in articulating its justification for war:

Two harsh words are used again and again. One is “liars” and the other is “smug”. One can try to defend the Blair administration against the charge of lying, but it is much like defending the Major Government against the charge of sleaze. It was the 45-minute weapons of mass destruction that did it. Part of folklore of public memory is that Tony Blair took Britain to war on a lie.¹⁷¹

The poor poll showing increased concern already apparent among Mr Blair’s own back-bench MPs, especially those who had only reluctantly swung their support behind the Government in the run up to the crucial house of Commons vote on the eve of the war. Their concern was heightened from a sense of failure properly to execute the post-conflict phase which, as argued above, undermined the *jus ad bellum*¹⁷². (See p109 for discussion of the impact of this at the international level). Months before the damaging local election results, Toby Helm, Chief Political Correspondent of *The Daily Telegraph*, summarised the damage to Blair thus:

In summer 2002, before Iraq had become the dominant issue in world diplomacy, he looked untouchable. His reputation in the EU and the US was unrivalled among world leaders. A *Daily Telegraph* poll ... put Labour nine points ahead of the Tories.

By contrast a survey ... last month (Feb 2004) put Labour five points behind (the) Conservatives. Inside the Labour Party the war poisoned the atmosphere...(and) Mr Blair lost two Cabinet ministers.

^{*} Turnout was 40%

[†] By this time already a year after the ‘end of major combat operations’ (see p105)

For a time Iraq even threatened to end the Blair premiership as a row between Downing Street and the BBC over its justification ended with the death of Dr David Kelly, the government scientist.

A Commons vote on university tuition fees in January saw Labour anger spill over on to Mr Blair's domestic agenda as his majority of 161 was cut to just five. Had he lost it would probably have been the end.¹⁷³

The relevance of the University Top-Up Fees vote, is explained by Matthew D'Ancona, writing in *The Sunday Telegraph*. Backbench objections to what was a central plank of the Government's education policy were, argues D'Ancona, 'unreasonable' but reflected a deep-seated anger with the Government front bench, stemming almost entirely from dissatisfaction over the Iraq policy: 'What has driven the Labour party mad? The Iraq war, certainly: the lesions left on the British body politic are still raw and festering. In the eyes of a growing number of backbenchers the Prime Minister is now behaving more like a commander-in-chief than a party leader.'¹⁷⁴

At their 2004 Annual Conference, members of the Liberal Democratic Party called on Mr Blair to resign as an adopted motion declared the war with Iraq 'unjustified and based on misleadingly presented and falsely interpreted intelligence.'¹⁷⁵ Perhaps most serious for Mr Blair, though, was the damage done to his standing in his own party and the splits that resulted even in his Cabinet. The loss of two Cabinet members is referred to by Helm: Robin Cook, a former Foreign Secretary, resigned as Leader of the House of Commons before the war commenced, and Clare Short did so shortly afterwards. Both continued to attack the Government's policy on Iraq, but Ms Short went further. In an interview on BBC Radio 4¹⁷⁶ she accused the Government of having spied on the UN Secretary General. The relevant point here is not whether or not the British Government engages on espionage within the UN, nor even if it is right or wrong to do so. It is that the divisions between Cabinet members over the war's justification were so deep that one went so far as to reveal such intimate and sensitive details of Government workings. In the run-up to the 2005 General Election there were elements of the Labour Party that went further still: deliberately seeking a reduced majority and the unseating of key Blair allies in order to weaken beyond repair the Prime Minister's personal standing and force him to stand down in favour of the more left-leaning Gordon Brown.¹⁷⁷ The Campaign was led by *The New Statesman* in an article entitled

‘How to Give Blair a Bloody Nose’, which included a guide to which key Blair supporters could be unseated.¹⁷⁸ Their target audience was clear: ‘You are a disgruntled Labour voter. You opposed the Iraq war, and the Prevention of Terrorism Act.’ Other factions, with a similar theme established web-sites advising disgruntled Labour voters on tactical voting options, and invariably referring to the Iraq War as a primary issue in their reasoning. The ironically entitled *Backing Blair* announced: ‘We want to register a highly visible and damaging protest vote against Tony Blair, his style of government, his right-wing leanings, and his lies about the ‘war’ on terror and Iraq’,¹⁷⁹ whilst *Strategic Voter 2005* claimed: ‘We can hold New Labour to account for the illegal invasion of Iraq. We explain why it can work, and how to use your vote skilfully. Let’s aim for change. Especially in marginal constituencies, we have the power as voters to make this a Peace Election the politicians won’t forget in a hurry.’¹⁸⁰

The final result of the 2005 UK General Election did indeed see a significant swing against the Labour Party (a net overall swing of 3% from Labour to Conservative). Though far from sufficient to unseat Labour, the electoral shift was widely regarded as having been just the ‘bloody nose’ that critics of Blair – and particularly of his Iraq policy – had called for. With a final division of seats between the major parties of 356 Labour, 197 Conservative, 62 Liberal Democrat, Labour had lost 33 seats to Conservatives and 11 to Liberal Democrats. Their majority was cut to just 66 from 167.¹⁸¹ In the concurrent County and Unitary Authority elections Labour fared even worse, losing a net 109 councillors. In many constituencies there was a marked swing to the Liberal Democrats specifically on the Iraq issue. In Cambridge, for example, a massive swing (presumed to be particularly student voters) unseated long serving (and, ironically, anti-war) Labour MP Anne Campbell*.

One party was set up specifically in opposition to the Iraq War. Former Labour MP George Galloway enjoyed unprecedented success for a small party. Standing in a heavily Muslim-populated constituency in East London he overturned Blair-loyalist Oona King’s 10,000 majority to take the seat with 39% of the vote¹⁸². (Despite good

* It is likely that opposition to University Top-up fees also played a part.

showings in Birmingham and West Ham, this was his Respect party's only won seat, however). The significant point to be drawn is that a constituency with a significant Muslim community registered a heavy protest vote against the Iraq War of 2003 but there is no evidence of similar anti-government protest from British Muslims over the 1991 Gulf War (nor, indeed, though not tested at an election, over Afghanistan in 2001-2). The difference, surely, is a well articulated, and widely accepted justification in 1991 and a lack of it in 2003, leaving Muslim communities open to the view that it was an unjustified attack by the West on a Muslim country. The tenor of the Respect campaign is well represented in Figure 2-3 and also in Mr Galloway's victory speech: 'Mr Blair, this defeat is for Iraq and the other defeats that New Labour has received this evening are for Iraq. All the people you have killed and all the loss of life have come back to haunt you and the best thing the Labour Party can do is sack you tomorrow.'¹⁸³

Over the weekend following the election, the UK press carried many reports of disquiet among Labour MPs, including many erstwhile loyalists, with some demanding that Mr Blair stand down.¹⁸⁴



Figure 2-3: Respect Party Campaign Card

It is not just political standing and authority that can be undermined. Senior members of both the Church of England and the Roman Catholic Church in Britain expressed doubts about the morality of the war. In a joint statement shortly before commencement of military action, the Archbishop of Canterbury and the Roman Catholic Archbishop of Westminster noted that 'doubts still persist about the moral legitimacy as well as the unpredictable humanitarian consequences of a war with Iraq.'¹⁸⁵ Analogous to the

points made in the previous section about moral leadership at the international level, lack of clear justification for war undermines a government's moral authority at home. In September 2004 the Bishop of St Edmundsbury, the Rt Rev Richard Lewis, went further than previous Church statements in directly criticising the Prime Minister, saying it was no longer possible to trust him: 'Mr Blair's moral authority has been tainted and his leadership has certainly been damaged. There must certainly be questions about his judgement or about his integrity.'¹⁸⁶ At the same time the extent of the public's concern over the Prime Minister's integrity was reflected in a YouGov poll that showed 48% of the public had no trust in Mr Blair personally, and 90% believing issues surrounding the Iraq war had done some political damage to him.¹⁸⁷

Perhaps unsurprisingly the war with Iraq was much less controversial in the United States, not least as – despite an absence of any significant evidence – it continued to be viewed in the public consciousness as inextricably linked with the War on Terror, and retaliation for the terrorist attacks of 11 September 2001. However, even in the US the lack of clear justification for the war damaged the President and threatened his 2004 re-election. The issue dominated the first of three televised debates between George Bush and his Democrat opponent John Kerry. Whilst defending the right of the US to act unilaterally and pre-emptively, Kerry stressed the need for legitimacy:

No president...has ever ceded, and nor would I, the right to pre-empt in any way necessary to protect the United States of America.

But if and when you do it ... you have to do it in a way that passes the test, that passes the global test where your countrymen, your people understand fully why you're doing what you're doing and you can prove to the world that you did it for legitimate reasons.¹⁸⁸

Kerry also made much of the cost to the US of having to act largely alone by failing to pull together an international coalition: 'After insulting allies and shredding alliances, this president may not have the trust and confidence to bring others to our side in Iraq.'¹⁸⁹

Well before the US election campaign started, commentators were noting the damage that had been done to the hawkish wing of the US administration:

The conservative think-tanks that last year trumpeted America's new muscular approach are having to spend more time defending the war in Iraq than proposing the next bold step. And while the administration has not abandoned its talk of reshaping the world, since January it has faced a much more sceptical audience.¹⁹⁰

Nor was George Bush any more immune than Tony Blair from challenges to his moral standing. Even before military action had been taken in Iraq, the US Conference of Catholic Bishops, in an open letter, argued that the impending action would fall considerably short of just war criteria.¹⁹¹

Beyond the damage that may be done to a particular leader, government or political party, there is also the danger that engagement in an unjustified (or not widely perceived as justified) conflict will do wider damage to government and the institutions of democracy in general. In September 2004 The Committee on Standards in Public Life published a report on public attitudes towards conduct in public life.¹⁹² The survey found that just 28% of respondents thought Government Ministers told the truth, and there was widespread distrust of Government. Of those respondents who said their answers had been influenced by recent events 74% listed events relating to the Iraq war, with 60% listing the War in general, 42% the Hutton Inquiry and 23% the Government's Dossier on Iraqi arms. These were the top three factors.

Against the backdrop of the Iraq War, former British Prime Minister John Major* highlighted the importance of public trust and warned that it had been seriously undermined: 'It is fatal to the conduct of policy if the word of any Government is disbelieved until proven beyond doubt to be true. The erosion of trust has now reached the point where it is undermining the ability of the Government to call on the trust of the people – as recently, for example, on Iraq.'¹⁹³ Much of the 'erosion of trust' to which Major refers was attributed to the Government's style in general, but a significant factor was the lack of trust – referred to above – resulting from the way in which the Government used, or was perceived to have used 'spin' to bolster its case for war given its failure to provide convincing justification. The perception of 'spin', Major argues,

* John Major was Prime Minister from 1991, when he was elected leader of the Conservative Party after Margaret Thatcher's resignation, until 1997. He was thus in office for most of the 1991 Gulf War, including at the launch of the ground war, and at the outset of British involvement in the Balkans.

undermined the justification that the Government was making, thus, perversely, making it necessary for the Government to ‘spin’ the case still further. Reporting an interview with Major for *The Daily Telegraph*, Philip Johnston notes Major’s view that such lack of trust ‘seriously compromised the prospect of obtaining public backing for future military decisions that have to be made in the national interest.’¹⁹⁴

A related consequence of the lack of unambiguous justification for the Iraq War – and perhaps of the further undermining of trust in Government that resulted – has been close scrutiny of the prerogative powers exercised by Ministers. A detailed analysis of these powers and challenge to them was made by the House of Commons Public Administration Committee, in a report entitled ‘Taming the Prerogative.’¹⁹⁵ The report noted that ‘(s)everal witnesses considered the power to go to war to be the most significant of the prerogative powers. Despite recent experience of parliamentary involvement in decisions on military action, they believed Parliament’s influence should be increased.’ The evidence of former Foreign Secretary Lord Hurd was quoted:

Thinking of the position of individual members of our armed services going to war, we should only go into major conflict with a very strong measure of authority behind the government’s decision. In the case of Iraq, we tried and failed to get the obvious authority, which was that of the Security Council of the U.N. Obviously lots of people who normally go along with this did not and there was a strong body of public opinion which was also against it. Therefore, it seemed to me that in that case it was essential that your House should have a debate and vote.¹⁹⁶

Such prior parliamentary approval is not required nor has it previously been sought but the Rt Hon Tony Benn in his evidence to the Public Administration Committee went further than Lord Hurd and argued for a formal statutory requirement for parliamentary approval, analogous to the US War Powers Act.¹⁹⁷

In addition to the Government and perhaps Parliament, the institutions at most threat to their standing as a result of involvement in a conflict not widely accepted as justified, or from unjust conduct within it, are the armed services. In general throughout the Iraq war the British armed services fared well in the opinion of both politicians and the public, even those opposed to the war. They were roundly praised for their professionalism and (as discussed above) sometimes compared favourably – if not

entirely fairly – with their American counterparts for a more measured approach. The importance of public trust in its national armed forces is examined in detail, in the context of the Israeli Defence Force by Asa Kasher¹⁹⁸. Kasher argues that ‘(p)ublic trust in a military force or any other governmental organization is not merely an attractive decoration that the organization can enjoy. There are governmental organizations that have a *moral* obligation to enhance public trust in their core communities.’¹⁹⁹ (Original emphasis). Such trust is essential for, among other things, the citizens’ own quality of life but also for their support for the organization (lack of which the US Army suffered during the Vietnam conflict) and for the organization’s recruitment (a key practical consideration that will be considered again later). Public trust, according to Kasher, requires a ‘presumption of proper ethical compliance.’²⁰⁰ In the case of the Vietnam War, lack of support for the war, as well as concern over its proper conduct, undermined public trust in the US Army, leading to a crisis in morale from which, arguably, the US Army did not fully recover until the 1991 Gulf War. More usually, though, citizens in a democracy will understand that the armed forces act only on the Government’s bidding and so it is conduct rather than cause that is likely to lead to issues of public trust. Such was the case with the Iraq War.

Generally the British Army, in particular, enjoyed the support of the population, despite the considerable public misgiving about the justification for the war. But its reputation was undoubtedly tarnished by allegations (some subsequently proved false, others substantiated) of abuse of prisoners (See p112). The impact of the allegations was captured in an opinion piece in *The Daily Telegraph*²⁰¹:

We have always felt that we could send Tommy Atkins abroad secure in the knowledge that, unlike some soldiers, he would not run drugs rings or prostitution rackets or mistreat the natives. If we can no longer make that assumption, then the whole country is diminished.

The Army is, of course, a human institution, and prone to human failings (but) (i)f soldiers have abused their positions, they should be given exemplary and expeditious punishment.

Our reputation as a country depends on our comportment abroad.

This editorial is right: the Army is composed of soldiers, who are human, and subject to human failings. There can have been no conflict where excesses have not occurred – both, more understandably, in the heat of combat and its immediate aftermath, and in

the treatment of civilians, the wounded and prisoners. For an insight into the nastier side of human nature when one group comes into a position of dominance over another, weaker (or weakened), group one need look no further than the infamous ‘Stanford Experiment’²⁰². This is not to justify, condone or excuse such behaviour, just to say that it is not new and should not come as a surprise. But none of that reduces its impact: the institutional damage it does. As the UK’s Chief of the General Staff said of the (subsequently disproved) allegations involving soldiers of the Queen’s Lancashire Regiment: ‘If proven they have besmirched the Army’s good name and conduct. (B)y this shameful behaviour (they) have let down the tens of thousands of British soldiers who have worked in the most commendable way.’²⁰³

The Army – indeed all professional armed services – thrives on its reputation and that reputation is tarnished by misconduct; soldiers feel this keenly and morale may suffer. Beyond this, such conduct, and the damage it does to reputation, can have a negative impact on recruiting. For the British Army the court martial of soldiers from the Royal Regiment of Fusiliers for abuse of Iraqi prisoners, came at a time when there was already public disquiet over several high profile enquiries into allegations of bullying at training depots. Although it is difficult to quantify – and in particular to isolate individual factors – those closely involved with Army recruiting were quite clear that there was a negative impact²⁰⁴. Anecdotally, neither issue seemed to register so much with the potential recruits themselves but with the ‘gatekeepers’ – parents, friends and teachers. For a while, at least, pride in joining the Army was diminished.

The impact at the individual level, and particularly on the morale of soldiers, if there is a lack of conviction in the justification for a conflict will be considered in the next section. However, a related factor that plays essentially at the national level is that of recruiting and retention, of the reserve forces especially. The impact on the reserve forces is the more noticeable because among the many inter-acting motivational factors for regular soldiers it has to be remembered that they are first and foremost professional soldiers; the military is their career and livelihood is soldiering so though there may be impact – as the next section will examine – there are unlikely to be mass resignations. Such is the complex nexus of factors that comprise a soldier’s motivation that from

personal experience the author knows of a great number of servicemen who on the one hand were ill at ease with the justification for the 2003 Iraq War (and many adamantly opposed) who nevertheless wanted to be personally involved. Some of these factors play with reservists too, but one key factor is different; only for very few is their livelihood dependent on military service. It is no surprise, therefore, that there should be a greater impact on reserve force recruiting and retention. It cannot be argued that this is solely down to moral objection. Indeed some down turn had been seen to reserve force recruiting and retention during the Bosnian intervention, which was not generally subject to moral objection.²⁰⁵ The Iraq War placed a huge strain on Britain's reserve forces (as, indeed it did on those of the US). In part the recruiting and retention down-turn will result from the loss of those who did not expect their part-time service to result in call-up – or at least not for anything less than defence of the UK homeland. As Andrew Murrison MP put it in a parliamentary debate on the reserve forces:

Would he (Desmond Swayne MP) agree ... that a large number of reservists join the Territorials, the Royal Naval Reserve or the Air Force Reserve to defend the homeland? That is implicit in the term 'territorial'. A small but significant number of them have some difficulty in being just an arm of the Government's foreign policy.²⁰⁶

For others it will be pressure from their families, or from their employers²⁰⁷ or simply the inability to reconcile the demands of called-up reserve service with sustaining a civilian career. Nevertheless, it seems reasonable to argue that such strain, and the impact on retention and recruiting, was exacerbated by a lack of public support for the war. Nor was this an issue just for the UK. America's reserve force recruiting suffered too, despite the attractiveness of the package offered to reservists in terms of medical care (in perpetuity) and college funding.²⁰⁸

The UK's Adjutant General, Sir Alistair Irwin, has also emphasised the importance of proper conduct in war – addressing in particular counter-terrorist wars where the enemy may be seen to enjoy the advantage of what Irwin terms 'moral asymmetry'²⁰⁹; that is to say that the enemy is able to act without regard to either the legal or moral rules that are binding his opponent.

(D)emocracies are expected to behave in a way that is entirely consistent with the law.*The opprobrium that attaches to national institutions that act illegally is infinitely greater than anything that attaches to the terrorist themselves. An untrue statement by those defending a democracy is castigated – because democracies are expected to tell the truth.

General Irwin identifies four reasons why democracies must remain ‘on the right side of the law; on the right side of what is right and what is wrong’. Two – common humanity, and the continued pride of those engaged – act primarily at the individual level and will be considered in the next section. His other two reasons are the practicality of avoiding unintended long-term consequences, and operating in an environment of continued scrutiny by ‘an army of organisations and bodies prowling the touchline watching for every infringement of the rules.’²¹⁰ Considering long-term unintended consequences the General notes that ‘we can all call quickly to mind the counter-productive effects of engaging in illegal acts, especially those that involve excessive violence.’ This issue was looked at above in respect of the international consequences (see p112 *et seq*) but is equally valid here.

The final issue to be considered from the national/domestic-political perspective is that of acceptance of casualties. This, too, is an issue that impacts at both this and the individual level. In the decade that followed the end of the Cold War, a perceived feature of many interventions and would-be interventions was an aversion to casualties. Of course, a desire to minimise casualties, especially on ones own side, is natural and an appropriate desire for any politician or military commander; indeed it is their duty.²¹¹ If aversion to ‘needless’ casualty was etched on 20th Century Western consciences by images of the First World War, it was certainly, for the US, reinforced by the Vietnam experience: ‘Some of the impetus for casualty aversion arises from within the armed forces and originates in the military’s Vietnam legacy. Many in uniform believe that lives were needlessly lost in the war in Southeast Asia and are determined to avoid putting military personnel at risk unless absolutely necessary.’²¹² It is hardly surprising that this should be a significant issue for Western democratic governments whose

* And, one might add, consistent with the norms of international society (See Section 1.1.3)

decisions will be interrogated by the media and held open to public scrutiny. The UK MOD recognised this explicitly in a key policy document published in 2000²¹³:

Casualties to our own forces will only be acceptable to public opinion if they are seen to be proportionate to what is at stake in the campaign. The critical factor will be the extent to which the public feels the UK national interest is engaged or the scale of the wrong being righted. The degree of public aversion to casualties can be expected to vary between members of an alliance, and this may have an impact on operational planning.

Even when the stakes are high or the wrong being righted is significant, the public may be unprepared for high casualties. During the 1991 Gulf War, the commander of the British 7 Armoured Brigade, Brigadier Patrick Cordingley, caused outcry in the British media when he warned in a newspaper interview that people should expect large numbers of casualties. This despite the fact that the Government had placed the National Health Service on ‘full alert’.²¹⁴

Casualty-aversion has been particularly associated with US reluctance to engage in humanitarian interventions after the debacle of the 1993 Somali operation.²¹⁵ Yet a study by the RAND Organisation and the Triangle Institute for Strategic Studies in 1999 found that the US public were (in their response to interviews, at least) less averse to casualties than had been assumed and certainly less so than either the military or political leadership. Unsurprisingly, however, their readiness to accept casualties was based on their perception of national interest. Given three possible conflict scenarios – actions to prevent Iraqi development of Weapons of Mass Destruction (WMD), defence of Taiwan against Chinese invasion, and stabilisation of a democratic regime in Congo – interviewees in each class were asked how many casualties they would find acceptable. Table 2-6 shows the results, and may suggest why WMD featured so highly in the justification presented to the American public for the 2003 Iraq War:

Mission	Average of acceptable casualty figured given by interviewees of each group:		
	Military Leadership	Political Leadership	Public
Stabilisation of Congo	284	484	6861
Prevention of Iraqi WMD	6016	19,045	29,853
Defence of Taiwan	17,425	17,554	20,172

Table 2-6 Number of Casualties Deemed Acceptable.

In the 1982 Falkland Islands conflict and again in the 1991 Gulf War, the British public and media, while saddened by casualties (which were relatively light) were broadly accepting of them. In the 2003 Iraq War, which did not enjoy the same extensive public support as necessary and right, casualties were less readily accepted. Acceptance of casualties reduced dramatically as more evidence emerged to suggest that the WMD intelligence, on which, in the UK especially, the war had been justified, was deeply flawed. In September 2004 the US Iraq Survey Group (ISG) report was published, concluding that:

‘Saddam Hasayn (sic) ended the nuclear program in 1991 following the Gulf War. ISG found no evidence to suggest concerted efforts to restart the program’²¹⁶ and ‘...ISG judges that Iraq unilaterally destroyed its undeclared chemical weapons stockpile in 1991. There are no credible indications that Baghdad resumed production of chemical munitions thereafter...’²¹⁷

The following day’s headline in *The Daily Express* was ‘They Died for a Lie’.²¹⁸ Even before that, *The Daily Mail*²¹⁹ had published a picture of Tony Blair’s face created out of a montage of pictures of all those UK soldiers who had been killed on operations during his premiership*. The issue re-emerged during the 2005 UK General Election. The Conservative Party used a poster showing Tony Blair’s face with the slogan ‘If he’s prepared to lie to take us to war he’s prepared to lie to win an election.’ The father of a soldier killed in the war stood as an independent candidate against Mr Blair in his constituency. Reg Keys, standing as an independent, took 10.3% of the vote, finishing third just behind the Liberal Democrats. Whilst never a significant threat to Mr Blair’s re-election as MP for Sedgfield, Mr Keys’ campaign – and a subsequent BBC documentary that followed it in detail – must be counted a serious personal embarrassment to the Prime Minister. Moreover, it is unprecedented as an expression of personal blame for the death of UK servicemen on duty. What made casualties unacceptable – to many – in 2003, was that the justification for the conflict was not sufficiently accepted.

Justification of conflict – and justifiable conduct within it – has an important effect at the national/domestic-political level. In Western democracies any government

* Aping a similar treatment of President Bush by a US artist.

committing its military to conflict without clear – and well-articulated – justification risks its electoral support. Not just the electorate's support is at risk, but also support within the ruling party; it is the leadership's personal standing that will be undermined. The ill-articulated justification for the 2003 Iraq war did serious damage to Tony Blair's authority both as Prime Minister and as Labour Party leader but also the issue saw the personal integrity of the Prime Minister challenged in a way not seen in modern British politics. Beyond the standing of a particular government there is also the risk of damage to the institutions of public life; confidence in them can be undermined. This includes both the institutions of democratic rule and also the armed forces. In the latter case, particular harm is done by association with perceived unjust conduct – however isolated the instances may be. The armed forces may further be damaged by a negative impact on both recruiting and retention; and this effect may be particularly sharply felt by the reserve component. Finally, at the national level, acceptance of casualties is sharply reduced by a lack of sympathy with the *causis belli*.

2.3.3 Relevance at the Individual Level

The foregoing sections have considered the impact at the international and national levels of engaging in conflicts without widespread acceptance of their justification, or of conducting conflicts unjustly. This section now turns to the men and women most immediately affected – those of the armed forces who must execute their nation's policy. It asks, then, what the impact will be on these individuals, of a lack of justification for conflict, or of unjust conduct therein.

This is a complex business, because the motivation of servicemen is complex. Even in conflicts which may at face value seem to be ideology-rich, scraping below the surface inevitably reveals very mixed motivation (as well as conduct that falls across a wide moral spectrum). In his study of the American War of Independence (or what he argues convincingly should better be termed the Anglo-American Civil War) Hugh Bicheno²²⁰ reveals that the men (predominantly) of the US 'Foundation Myth' often fought for reasons far short of the moral high ground of liberty and democracy; greed and personal profit were every bit as much the driving force for many. Equally, in this war as others,

one can find evidence of those whose motivations may once have been at least partially righteous and idealistic becoming disenchanted as they saw the morality of their cause undermined by the cynicism of their leaders. Thus military history's most famous turncoat, Benedict Arnold, cites, with reasonable claim to sincerity, the manipulation of cause as his justification. (Of course, however sincere, we must still add injured pride, professional jealousy and pecuniary advantage amongst his motivations!). It was the alliance with France, 'the enemy of the Protestant Faith' and Congress's 'sovereign contempt of the people of America, (having) studiously neglected to take their collective sentiments of the British proposals of peace'²²¹ that were the final straw for Arnold's support for a cause he once so nobly fought for. Nearly a century and a half later similar disenchantment with a war once deemed righteous can be found in Siegfried Sassoon's 'Statement Against the Continuation of the (First World) War – 1917'²²²:

I am making this statement as an act of wilful defiance of military authority, because I believe that the war is being deliberately prolonged by those who have the power to end it. ... I believe that this war, upon which I entered as a war of defence and liberation, has now become a war of aggression and conquest. I believe that the purposes for which I and my fellow-soldiers entered upon this war should have been so clearly stated as to have made it impossible to change them, and that, had this been done, the objects which actuated us would now be attainable by negotiation.

I have seen and endured the sufferings of the troops, and I can no longer be a party to prolong these sufferings for ends which I believe to be evil and unjust.

The First World War, entered into on a tide of patriotic fervour turned rapidly sour by the realities of industrial killing, is perhaps more replete than any other with examples of men's motivation, once grounded in moral justification, gradually undermined as the war progressed. To give but one further example, Rudyard Kipling's response to the war, full of imperial pride and moral righteousness at its commencement, turned to bitter disillusionment after his son's death²²³:

If any question why we died.
Tell them, because our fathers lied.

And:

I could not dig: I dared not rob:
Therefore I lied to please the mob.
Now all my lies are proved untrue

And I must face the men I slew.
What tale shall serve me here among
Mine angry and defrauded young?

The First World War is perhaps also a special case because it involved such a massive mobilisation of an (initially) volunteer citizen army. Any consideration of motivation needs to distinguish between professional soldiers, volunteer citizens and conscripts, all of whom have different motivations and will be affected differently by the justification of the cause – and indeed may have different attitudes, also, to conduct. This need to distinguish remains true today. In Iraq the motivation of the professional soldier may be very different from that of the US National Guardsman and different again for the British Territorial.²²⁴

Richard Holmes, when considering in his comprehensive study of the realities of war, *Firing Line*, what motivates soldiers to fight, notes first of all that some simply enjoy it and most, even conscripts, find something appealing about their military service, albeit maybe only in retrospect.²²⁵ In the accounts of veterans of wars, amongst many emotions, sense of purpose, excitement, exhilaration and experience (particularly experience shared with a close-knit group of colleagues) can be identified as the motivation for some and the mitigation for many. And throughout history there have been many who voluntarily serve as soldiers as a means of escape from failure in civilian society (whether in love, money or obedience to the law!)²²⁶ Nevertheless, the more honourable motivation of patriotism can also be distilled, which may descend into a narrower sense of duty and responsibility as conflict and service progress. So at least part of a soldier's motivation is likely to be vulnerable to concerns over justification of cause.

As noted above, motivation varies between individuals, between conflicts and, doubtless, within individuals over time. In a study of American Civil War veterans, John Dollard was told by three-quarters of veterans of the (all volunteer) Abraham Lincoln Brigade that belief in war aims were the most important thing in overcoming fear in battle.²²⁷ Yet only 5% of veterans of a (largely conscript) infantry division which fought in North Africa and Sicily in the Second World War listed idealistic motivation to success.²²⁸ Nevertheless, Field Marshal Montgomery, whilst conceding

that soldiers 'do not advance over dangerous and fire-swept ground in the conscious pursuit of an ideal' still believed that

(n)o nation could fight an unpopular war^{*}; the war must be accepted by the people, since a democracy cannot oppose the will of the majority of its citizens. The soldier, as a citizen, must therefore be convinced of the rightness of the cause. At least his reaction to the declaration of war must be acquiescence, even if this is only passive: he must not be hostile to it.²²⁹

Field Marshal Slim takes an altogether stronger line, listing 'a great and noble object' as a fundamental of morale.²³⁰

Lord Moran, in *The Anatomy of Courage*, takes a view related to that expressed by Montgomery, that only in a morally virtuous society will the will be found to rise to the challenge of a necessary conflict. Contrasting Germany's complete preparation for the Second World War with the predominantly pacifist mentality instilled in Britain by the First, Moran argues that 'a free people is only ready to resist aggression when the Christian virtues flourish, for a man of character in peace is a man of courage in war.'²³¹ In this sense both moral justification and moral conduct are necessary to get the generally peaceful individuals of a democracy to consent to resort to force.

Of course, if the rightness of a cause is in little doubt, then it is unlikely to feature in any discussion. Even when it is, other factors may take over. For professional soldiers there is often a sense that rightness or otherwise of a particular conflict is an issue for politicians, the media and the public, whilst their role is simply to do their job. Interviewed for a BBC documentary about the 2003 Iraq War²³², Royal Navy crews responsible for launching Tomahawk Land-Attack (Cruise) Missiles (TLAM) admitted that whilst they did think about the consequences at the target end, they had to suspend consideration of the ramifications because they 'had a job to do.' However, in the same programme an RAF wing commander confesses 'I'm not comfortable with this. Maybe I'm turning into a pacifist.' From personal experience the author can also relate the mixed feelings of a serviceman, deeply concerned that the Iraq War lacked clear moral justification (and, probably legality) and yet keen to participate for all the traditional

^{*} The 2003 Iraq war could provide basis for discussion of whether this holds true for a very limited war as for a general one.

‘other’ motivations of the soldier – to test professional competence and seek professional satisfaction, out of a sense of adventure, and for personal reward, recognition and career advancement. These deeply conflicting emotions were commonplace.²³³ The tension such internal conflict causes must have some impact on an individual’s morale, however much he wishes just to ‘get on with the job.’

In an attempt to quantify the human factors which affect combat performance and limit the effectiveness of manned systems the Defence Evaluation and Research Agency (DERA) Centre for Human Sciences (CHS) developed the Human Effectiveness Research in Operations (HERO) model²³⁴ shown at Figure 2-4 The HERO Model. The factors ringed are those which may be regarded as influencing or being influenced by issues of motivation and, in particular, justification of cause. This model was used by David Clouston²³⁵ as a basis for considering the factors that should be considered in attempting to model ‘friction’. So it can be seen that a significant number of motivational factors, related to cause, have a contributory part in the ‘friction of war.’ This would support the ‘Montgomery’ view identified above; if belief in cause is not actually fundamental (the ‘Slim’ view), then its absence is at least an inhibitor to military effectiveness.

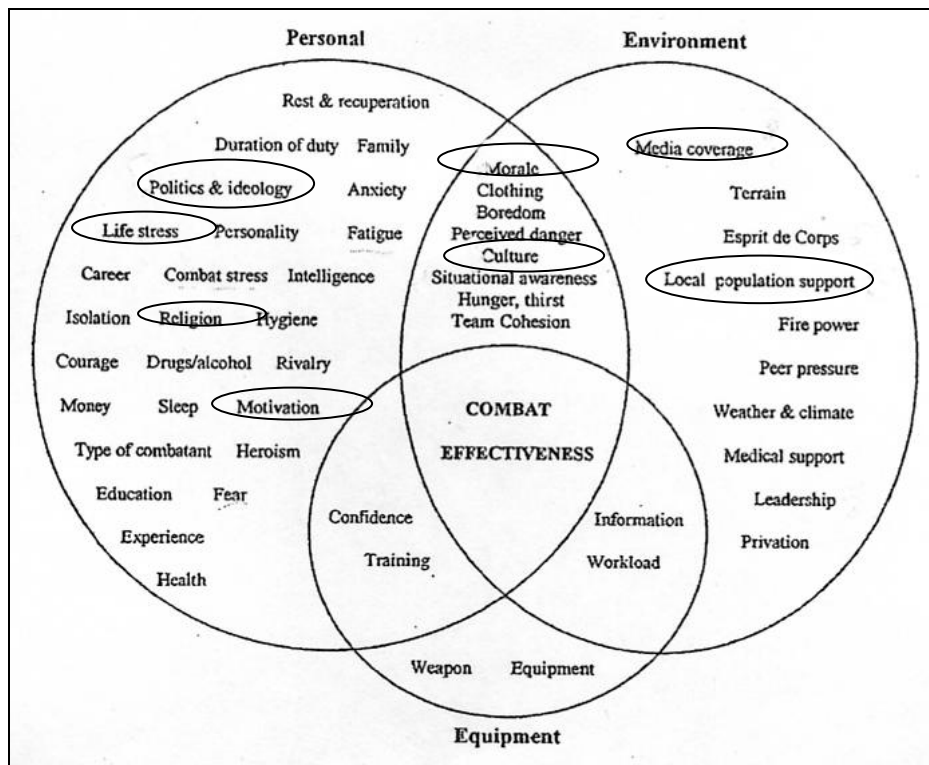


Figure 2-4 The HERO Model

To return briefly to Moran, his central thesis is that individuals have a well of courage on which they can draw, but it is neither limitless nor easily refilled. There are things that can add to the well, props a man can lean on, shoring up the walls of the well, to continue the analogy, and it seems reasonable to argue that belief in cause and pride in the morality of his own and his colleagues' conduct will be among these. By contrast, those things considered above as adding to 'friction' will have a negative effect on the well's depth: 'The story of how courage was spent in France is a picture of sensitive men using up their will power under discouraging circumstances while one by one their moral props were knocked down.'²³⁶

In a political age that has become somewhat characterised by 'spin' it is perhaps worth heeding also Moran's experience that:

...the cooking of news before it was served up to the public in England was a prime factor in unsettling opinion in France. Men could not help seeing that this news was altered not because it gave information to the enemy for they already knew it; they were left to speculate in whose interests such editing was carried out. ... Bad enough to find – and they often did find – that the mental outfit for leadership was wanting, but what of this cynicism at the top? ... Men began to

ask themselves in dumb dismay what was the good of it all. Authority declined, scepticism grew apace, men became critical.²³⁷

Interestingly, in 2004 a *Daily Telegraph* article²³⁸ reported a leaked advance copy of the UK Chief of the General Staff's Briefing Team report disclosing a considerable degree of disenchantment with what soldiers saw as the uncritical downward passage by the chain of command of 'Government spin' to support justification for the war in Iraq.

Anthony Kellett²³⁹ concludes that ideology (in which we can include belief in the justification of the conflict) plays a role in motivating soldiers before and after but rarely during combat. Critically, and echoing Montgomery, he notes that 'a loss of faith on the part of the ideologically committed soldiers makes them prone to demoralization.' Moreover, when it comes to 'military values and honor codes' – and historically these can be shown to include the principles of *jus in bello* – then Kellett's conclusion is that 'those who subscribe to them – particularly professional officers and senior non-commissioned officers – are likely to be strongly influenced by them in their combat behaviour, especially in the provision of exemplary leadership. Military values, therefore, have an influence disproportionate to the number of adherents.' Demoralization of this cadre, then, is likely to have a disproportionate effect on the whole.

The need to differentiate between regulars and conscripts/short-term volunteers has already been noted. Kellett observes that 'short service soldiers have shown themselves more likely to be influenced by such factors (as) self-discipline, short-term group affiliation, ideology, and home front attitudes.'²⁴⁰ The latter two are directly related to issues of cause and justification, so Kellett's conclusion would seem to support a view that justification will be a motivator, or its absence a demotivator, particularly for the part-timers and reservist who are becoming an essential part of military capability today both in the UK and the US. This issue with respect to the UK's Territorial Army and the US National Guard will be addressed further below.

S.L.A. Marshall is very much an adherent to the 'small group cohesion' theory of combat motivation: 'I hold it to be one of the simplest truths of war that the thing which

enables an infantry soldier to keep going with his weapon is the near presence or the presumed presence of a comrade.’²⁴¹ And: ‘He is sustained by his fellows primarily and by his weapons secondarily.’²⁴² Marshall admits that ideology and other such moral motivations play a part but enjoins commanders to understand their limitations: ‘It should not be expected that pride in a uniform or belief in a national cause are of themselves sufficient to make a soldier steadfast in danger and to persuade him to give a good account of himself in battle’²⁴³

To bring this survey of combat motivation fully up to date, the Strategic Studies Institute’s study of combat motivation in the 2003 Iraq War²⁴⁴, acknowledges Marshall’s conclusions as still valid and yet found that soldiers today ‘understand the moral dimensions of war.’ Among their combat motivators they ‘cited ideological reasons such as liberation, freedom, and democracy as important factors.’²⁴⁵ Among the Iraqi regular soldiers interviewed (all them prisoners of war), the study concluded that coercion by and fear of the Baath party and the *Fedayeen Saddam* were the common motivators.

Interviews uncovered no evidence of higher order concepts such as commitment to national service or the Arabic obligation to withstand (*Sumoud*) among the Iraqi soldiers interviewed. The soldiers never invoked Iraqi nationalism or the need to repel Americans as an invading army in response to questions about why they were in the Army, or what would cause them to try their hardest in battle.²⁴⁶

This might seem surprising of soldiers who, however much they may have been conscripts in the Army of an oppressive regime, were fighting to repel an invader. Of course, (and as the report concedes) these responses may have been conditioned by circumstances: prisoners were seeking to gain favour with their captors by claiming to have been forced to fight; but the report’s authors hold it just as likely that with freedom evidently close (PW releases were already beginning) the Iraqis felt able to speak freely.

In the case of US soldiers in Iraq, the study found that most had joined the Army for traditional reasons (money for college, experience and excitement before looking for a regular job, following family footsteps) with just a very few having been motivated by the events of 11 Sep 2001. Performance in conflict was most heavily influenced, as Marshall and Kellett would have expected, by small group cohesion and it was social

rather than task cohesion that had the greatest influence: ‘(The) desire to contribute to the unit mission comes not from a commitment to the mission, but a social compact with the members of the primary group.’²⁴⁷

In contrast to earlier studies of combat motivation of US servicemen in World War Two, Korea and Vietnam, Wong et al found that, particularly once the outcome of the 2003 Iraq war was certain, US servicemen of that conflict expressed themselves highly motivated by idealistic issues, particularly focussed on liberating the Iraqi people, bringing democracy to the region and ending an oppressive regime (but not, perhaps surprisingly, nationalistic or national security issues).²⁴⁸ The study concludes that: (b)ecause our soldiers trust the Army as an institution, they now look to the Army to provide the moral direction for war. As this study has shown, soldiers still fight for each other. In a professional army, however, soldiers are also sophisticated enough to grasp the moral reasons for fighting.²⁴⁹ Most recent British doctrine also recognizes this and identifies belief in cause as an element in developing and maintaining unit cohesion, thus creating an indirect link between moral issues and combat effectiveness: ‘Troops who have moral cohesion stick together: they continue to fight despite adversity and local reverse. It results from a combination of several factors, including high morale, good leadership, esprit de corps and *belief in the cause at stake*.’ (Emphasis added).²⁵⁰

If the above survey of combat motivation literature reveals no conclusive direct link between motivation and justification of cause (or morality of conduct), it does strongly suggest that ideology is at least a motivational factor, and the more so for modern professional armies whose soldiers are sufficiently well educated to be engaged by the issues. Perhaps most important when considering the importance of justification at the individual level is the view that absence of justification, or doubt about cause, is likely to be a frictional factor, and thus diminish fighting effectiveness.

We are reminded, again, of the need to differentiate between what makes men fight, or fight well, in conflict from what motivates them to join the armed forces, either in peacetime or in response to actual or likely conflict. Thus moral justification is likely to

have a different role for the long-term professional than the role it has for the short-term volunteer or conscript. Visiting Iraq in 2005 as Colonel of the Princess of Wales's Royal Regiment, Richard Holmes found a marked difference between the attitudes and opinions of the largely National Guard and Army Reserve US servicemen and the mainly regular British soldiers. (The impact on Britain's reservists is discussed below). The US guardsmen regarded themselves as being 'at war.' Given the scale and the shock of the terrorist attacks of 11 Sep 2001 and the widespread acceptance in the US, despite the lack of any convincing evidence, of a link between the perpetrators and the Iraqi regime, this is not surprising. To many Americans the Iraq war was a clearly just response to unprovoked aggression that struck at the heart of America and her way of life. In the UK no such linkage took hold in the public imagination. Moreover, it was not until July 2005 that the UK suffered any direct attack from Al Qaeda, by which time any linkage with the Iraq war was more logically as cause (despite UK Government insistence to the contrary) rather than effect. UK soldiers tended, then, to take a more sanguine view of themselves as 'on operations' which implies routinely, and somewhat resignedly, fulfilling the policy of government. In the enduring operation that Iraq has become that is just as natural a response for a full-time professional as is the need for ideological motivation to bolster the morale of National Guardsmen whose lives have been turned upside down by a one-year compulsory call-out to face both the danger and the monotony of operations in Iraq.

British Military Doctrine understands military effectiveness in terms of 'fighting power, which is then understood to be composed of three components: Physical, Conceptual and Moral (see Figure 2-5). Although recognizing that such factors as 'self-respect' and 'sense of purpose' have a part to play, which we might relate to ethical issues, as presented here the Moral Component is rather narrowly defined in purely instrumental terms: 'the ability to get people to fight.' The subsequent publication *Soldiering*, goes further in establishing a more existential understanding for the role of ethics:

The British Army's high morale and willingness to fight are based on an ethos which must transcend functional output. Some of the most barbarous and unprincipled military organisations in history have had tremendous morale and will to fight, based on excellent motivation, leadership and management, which have given them great military effectiveness and operational success. They have even possessed a greater external ethic to inspire them to conquest. However,

consistent and sustainable national strategy, and true and enduring success on operations depend on moral strength – in war on moral dominance over an enemy - not just to overcome the adversary, but to establish the conditions for lasting peace.²⁵¹

The publication goes on to draw an explicit linkage to just war: ‘In battle, and all other military operations, high morale equates to the moral strength which gives true ascendancy over the enemy. The duty of bearing arms, of being prepared to fight, kill and if necessary die in carrying out orders, carries with it the responsibility only to do so in a *just cause*.’²⁵² (Emphasis added)

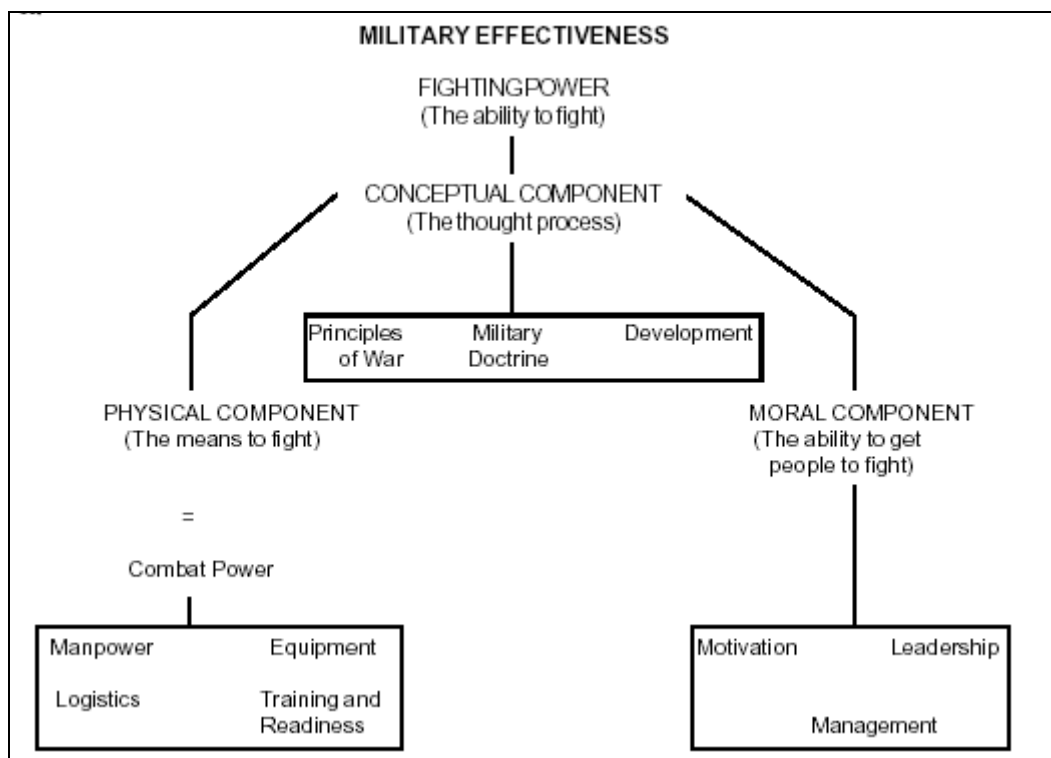


Figure 2-5 Military Effectiveness as Understood by British Military Doctrine²⁵³

This need for a more deontological understanding of the ‘Moral component’ is explained by Major General Sebastian Roberts: ‘...military effectiveness cannot be based on functional output alone, and unless it is focussed on higher external ethics, an army risks the moral bankruptcy of the Waffen SS. Soldiers must know that what they do is right, and that they have the support of their nation, their society, and their government.’²⁵⁴ To a degree this mixes up the instrumental and the existential but the point is clear: for the British Army being an effective killing machine is not enough; it is not an end in itself. Shortly before retiring as Adjutant General of the British Army,

Lieutenant General Sir Alistair Irwin reinforced the point when talking to officers about to take command of units:

(A)s servants of the nation, prepared to engage in mortal combat in the nation's interests, we must all of us share some basic principles upon which we base our lives and our soldiering.
No one, winner or loser, will survive unscathed as a moral being if he has engaged in bestiality. And worse no member of the organisation, or even the nation, to which that person belongs, can possibly dismiss it later as having been of no significance.²⁵⁵

In other words, we are all diminished as human beings if we engage in activity that is 'inhuman'. General Irwin acknowledged that two of the British Army's 'Core Values', Integrity and Respect for Others, are not essential, in an instrumental sense, for the creation of fighting power: the examples of 'the Vikings, the Mongols, the Italians in Ethiopia, the Germans in Russia, the Japanese in China' all militate against such a claim. But at the individual level, and corporately as a nation, there is a price to pay for inhumane behaviour – a loss of individual and corporate sense of humanity and worth. The quote above (p146) from *Army Doctrine Publication Land Operations* shows that in its latest iteration British military doctrine recognises the importance of moral issues and now interprets the Moral Component of fighting power much more broadly than 'getting people to fight.'

The issue of individual and corporate humanity links also to that of individual and corporate pride and guarding of reputation. Rev Andrew Totten, an Army chaplain, contends that beyond the instrumental or 'managerial' effectiveness of the military, there is an 'existential dimension of soldiering ... (that) is vital to the Army's moral basis.'²⁵⁶ He offers the analogy of a football club seeking to win its league:

At one level the match results will be the measure of the team's 'instrumental effectiveness'. At another The results will be taken as a measure of 'managerial effectiveness'. What remains is often overlooked: those footballers on the team who simply love the game itself, its tradition and skill, its comradeship and excitement. Of course they want to win, but there is an existential dimension at work that even extends to appreciation of the opposition's merits. ...
.... They could use bribery or foul play as the means to win matches. However, footballers winning by means of virtues such as fair play and discipline have crucially also achieved moral *self*-worth.

This is exemplified throughout history by soldiers pride in ‘fair play’, contempt for an enemy who ‘cheats’ and suspicion of new ways of war that are often perceived as ‘dishonourable’. It extends to a historical contempt for spies – even of ones own side – that is widely in evidence certainly before the Twentieth Century. It perhaps explains a particular ferocity in fighting across cultural divides when a shared understanding of honour is absent and again in fighting between irregular forces or between regulars and irregulars – an issue which will be considered in Chapter 4 when looking at challenges to just war. It is also in evidence in soldiers’ outrage and reprehension against colleagues who ‘let the side down’ by dishonourable acts.

Following the February 2005 conviction of three British Soldiers for abuse of Iraqi Prisoners, the Chief of the General Staff said: ‘I can now place on record how appalled and disappointed I was when I first saw the photographs. The incidents depicted are in direct contradiction to the core values and standards of the British Army, nor do they represent the vast majority of its soldiers....’²⁵⁷ Addressing a conference of British infantry officers, Major General Graeme Lamb, who commanded the British 3rd Division in Iraq in 2003, made the following reference to the incidents which had led to those convictions:

The officers and men under our command did not live up to the standard we expected of them. Those who failed were empowered when they should not have been, were left unsupervised when we probably knew they should not have, were allowed to embrace and populate a culture that was simply unworthy of us all.²⁵⁸

Equally, a sense of great pride can be seen in soldiers who believe they have been part of something honourable and the conduct of which has been ‘proper’. Conversations with some who took part in the 2003 invasion of Iraq revealed a perceived difference in approach to enemy casualties between the US who gave immediate first aid but then left Iraqi casualties for later, in particular not ‘wasting’ casualty evacuation helicopters on them, and the British approach which was treat all casualties equally regardless of nationality.²⁵⁹

Soldiers need pride not just in their own and their colleagues conduct but also in their mission. Setting out his ‘intent’ General B B Bell, Commanding General USAREUR

noted the importance of a shared belief in ‘the worthiness of the unit’s mission’ in creating the pride and self belief essential to ‘creating and sustaining good military units.’²⁶⁰ The corollary of this is that doubts about the worthiness of the mission may begin to damage unit morale and cohesion. In October 2003 the US Army’s newspaper *Stars and Stripes* reported concerns over morale of US troops in Iraq. Their own survey, whilst noting variations particularly between regulars (generally much higher morale) and reservists/national guardsmen (generally lower), recorded an overall 49% of surveyed troops describing their unit’s morale as ‘low’ or ‘very low’ compared with just 16% saying it was ‘high’ or ‘very high’.²⁶¹ Whilst noting that local conditions and services, together with end of tour dates, had a noticeable effect of responses, the survey highlighted the impact of understanding and believing in the mission. Morale was highest with soldiers who had a firm understanding of their role, were doing the job for which they were trained and saw a clear link between their current situation and the defence of the US. Those, especially reservists/national guardsmen, being used in an unfamiliar role and lacking such clear sympathy with the mission were far more likely to declare their own, and their unit’s morale to be low.²⁶²

Not just soldiers pride and morale is at risk if they doubt the validity of their mission but also their own and their families’ willingness to accept risk and casualties. Nowhere is more poignantly expressed a soldier’s readiness to lay down his own life for the sake of a cause he believes morally compelling, than in the famous letter of Sullivan Ballou to his wife written on the eve of the First Battle of Bull Run/Manassas:

If it is necessary that I should fall on the battlefield for my country, I am ready. I have no misgivings about, or lack of confidence in, the cause in which I am engaged..... I know how strongly American civilization now leans upon the triumph of government, and how great a debt we owe those who went before us through the blood and suffering of the Revolution, and I am willing, perfectly willing to lay down all my joys in this life to help maintain this government, and to pay that debt.²⁶³

In common with many colleagues the author personally wrote ‘final’ letters (though hardly as eloquently as Ballou’s) to his wife and unborn child shortly before commencement of the land campaign in the first Gulf War, 1991. The difficulty of writing such a letter was greatly reduced by a firm and unwavering view that what was about to be done was necessary, justified and honourable.

For many soldiers the 2003 Gulf War was far more problematic. The case for justification having been unconvincingly made, many felt a much greater reluctance to risk their lives and their families' happiness.²⁶⁴ Similarly the families of casualties were much less accepting of the losses they had suffered because they did not accept that their loss had occurred in a justified conflict. After the death of three Black Watch soldiers in Iraq in November 2004, the brother of one of them, Pte Lowe, said his brother had loved his job but neither he nor his family understood why the British Army was in Iraq, making his brother's death much harder to accept.²⁶⁵ (See also p135). A reluctance to accept casualties is an effect of lack of justification for conflict, which operates, then, at all three levels, international, national and individual, but particularly at the latter two.

Nor is it necessarily confined to acceptance of 'friendly' casualties; a lack of justification for the conflict might also lead soldiers individually (as well as nations collectively) to a greater reluctance to inflict casualties both on the enemy and on the inevitable neutrals. In the summer of 2004, 1st Battalion The Princess of Wales's Royal Regiment (1PWRR) had a particularly eventful tour in Southern Iraq, in the area of Al Amarah. During their six month tour of duty they fired more rounds than any British Battalion had done since the Korean War. Every soldier had been involved in a 'contact', most believed they had inflicted casualties and one soldier believed that his section had killed no fewer than 36 insurgents. All soldiers in the battalion were immensely proud of the unit's record and conduct; they were performing well and had great confidence in themselves.* Yet there were the beginnings of doubt in the operational end state.²⁶⁶ The mission, primarily related to the keeping open of a CIMIC (Civil-Military Cooperation) facility, was largely seen as irrelevant and yet was costing a significant number of enemy – and arguably many neutral – casualties, and not a few to the battalion. When the adrenalin rush is over those soldiers will have time to reflect on the casualties they inflicted, with the dispassion of time and distance. It is reasonable to suppose that some, unconvinced of operational necessity, possibly concerned in any

* The Battalion won both a Victoria Cross and two Distinguished Service Orders during the tour, in addition to two Conspicuous Gallantry Crosses and a staggering eight Military Crosses.

case at the justification for the conflict, and increasingly aware that the public at home, such as they were even exposed to the events in Al Amarah, were increasingly ambiguous in their support, will suffer a crisis of morale and conscience. Soldiers want – arguably need – to believe that what they are doing, risking their own lives and taking the lives of others, is right and for a cause supported by their nation.

Whatever their concerns or reluctance, professional soldiers have few choices but to get on with the job. There were, over the Iraq war, a few isolated instances in both the UK and US services of ‘conscientious objection’ – but very few. However, both nations are increasingly reliant on volunteer reserve forces whose mobilisation is more complex. A lack of justification for conflict, or concerns over its conduct can have a rather greater impact here when individuals choose to resign from reserve service as a result. It is not just the individual reserve servicemen themselves who must be considered, but their employers too, whose support is vital, in the UK’s case at least, to the successful use of the Territorial Army (TA). For Operation TELIC – the 2003 invasion of Iraq and subsequent operations in that theatre – the TA was mobilised on a scale not seen since the Suez conflict.²⁶⁷ The ongoing need for TA soldiers to support operations in Iraq (and simultaneously in Afghanistan and the Balkans) has had a profound and damaging effect on the strength of the TA that is the result of many factors and is well beyond the scope of this dissertation, but it is reasonable to include concerns over the moral (and legal) justification for the conflict among those that have caused both individual reluctance to serve and employers’ reluctance to support. (Nevertheless, there is indication that many employers are far more willing to accept the mobilisation of their employees for a ‘war’ situation than for enduring peacekeeping operations).²⁶⁸

One UK TA soldier made a very public statement of his opposition to the war, on moral grounds, by having his letter of resignation published in *The Guardian*. George Solomou, a medic with The London Irish (a company of the London Regiment), argued that ‘(s)oldiers cannot be above moral considerations. ... So I am resigning because I don’t want to fight a war that is unjustified and illegal.’²⁶⁹ He had already made several public statements of opposition to the war²⁷⁰ and has since become a prominent campaigner for ‘Military Families Against the War.’ It can, of course, be argued that it

took Solomou two years from the invasion of Iraq to declare his opposition to it and, indeed, that he had not been mobilised for service there. Nevertheless, his very public statement and subsequent campaigning have highlighted that for reservists, in particular, lack of moral justification for a conflict can seriously undermine their willingness to serve.

There is one further issue relating to the requirement for justification at the individual level. That is the matter of individual legal and moral culpability. However, discussion of this is deferred to the Chapter 4 in the specific, and most demanding, context of asymmetric warfare.

2.4 Summary

This Chapter opened by making the case that the legal paradigm for conflict had failed. It failed in part because of weaknesses inherent in its own structure, not least the P5's Security Council veto. In part, the failure has resulted from practicalities. There is no enforcement mechanism that would realise the analogy with domestic law, and there is evidence of a simple lack of faith in the institutions of peaceful conflict resolution. Finally, at the end of the Twentieth Century a reordering took place of the value set upon which the UN Charter paradigm had been predicated. As the perception of threat to global peace moved from that of international territorial struggle to that of internal oppression, so increasingly politicians have felt that the Charter's placing of order and stability above all else, based upon the inviolability of national sovereignty, was an unsustainable model. It could not be allowed to act as the screen behind which widespread violation of individual human rights was conducted.

The remainder of the chapter has been dedicated to demonstrating that notwithstanding the failure of the legal paradigm for justification of use of force, there remains a need for conflict to be convincingly justified, and conducted justly. This requirement was demonstrated to exist at three interlocking levels: international, national and individual.

At the international level it was argued that however powerful a state might be it is nevertheless constrained in its use of force. To use force without a broad international consensus that it is justified so to do, or to use it in a way that is deemed immoral, will detract from the ability to assemble the political and military coalition that is required for sustained military commitment. Moreover, a state's 'soft power' is reduced when unjustified – or unjust use of – force undermines moral authority and calls into question a hegemon's legitimacy – and hence its authority and leadership.

Nationally, at the domestic-political level, unjustified use of force, or its unjust application, threatens electoral support (at least, for democracies), and the status and standing of the ruling party and its leadership. Beyond this, the legitimacy and status of the very institutions of national democracy may be undermined and opened to challenge. And the reputation of the Armed Forces may be tarnished in a way that harms morale and damages recruiting. National will and the readiness to accept the inevitable casualties of a conflict is also undermined if the conflict is perceived to have been entered into unjustly or if its conduct has been improper.

At the level of the individual – and of particular relevance is the individual soldier – morale can be seen to be affected by concerns over justification of a conflict or by unjust conduct within it. Whilst there is little evidence to make the case that 'belief in cause' is a critical factor in the complex matrix that constitutes a soldier's morale, there is evidence that lack of belief in cause is a source of 'friction' that undermines military effectiveness. Concern over improper conduct by his colleagues also impacts on a soldier's morale and mental well-being, denting his pride in the organisation to which he belongs and collectively sully his reputation. As with the national level so too at the individual, concern about the moral legitimacy of the cause being fought for undermines the readiness with which casualties – to self, colleagues, friends and family – are accepted. In the case of reservists, in particular, this also affects recruiting and retention, and thus operational effectiveness.

Chapter 2: The Requirement for Ethical Justification

Thus the case is made, that at the beginning of the Twenty First Century there remains a need for the moral justification of decisions to resort to force, and there remains a requirement for actions within a conflict to be morally justified.

¹ James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), Introduction.

² UK Ministry of Defence Joint Warfare Publication 0-01 *British Defence Doctrine* (2nd Edition, 2001), p4-1.

³ E H Carr cited in H Suganami 'The 'Peace Through Law' Approach' in Trevor Taylor (Ed) *Approaches and Theory in International Relations* (Harlow: Longman Group, 1978), p101.

⁴ H Suganami, *ibid*, p101.

⁵ J B Scott, cited *ibid*, p102.

⁶ L Oppenheim, cited *ibid*, pp103-104.

⁷ *Id.*

⁸ H Lauterpacht, cited in H Suganami, *op cit*, p110.

⁹ *Covenant of the League of Nations (Including amendments adopted to December 1924)*. Geneva Library UNOG: *The History of the League of Nations*. On-line at <http://www.unog.ch/library/archives/lon/library/Docs/covnant.html>. Accessed 13 Apr.04.

¹⁰ *Ibid* (Article 12).

¹¹ *Ibid* (Article 11).

¹² The Avalon Project, *The Kellog-Briand Pact 1928*, on-line at

<http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>. Accessed 13 Apr 04.

¹³ A C Arend and R J Beck, *International Force and the Use of Force. Beyond the UN Charter Paradigm* (London: Routledge, 1993), p23.

¹⁴ *Charter of the United Nations*, Geneva Library UNOG: *The History of the League of Nations*. Article 51. On-line at <http://www.unog.ch/library/archives/lon/library/Docs/unchart.html>. Accessed 13 Apr.04.

¹⁵ *Ibid*, Article 107.

¹⁶ Evan Luard, *A History of the United Nations. Volume 1: The Years of Western Domination, 1945-1955* (London: MacMillan Press, 1982), pp8-10.

¹⁷ *Charter of the United Nations*, Geneva Library UNOG: *The History of the League of Nations*, Preamble. On-line at <http://www.unog.ch/library/archives/lon/library/Docs/unchart.html>. Accessed 13 Apr.04.

¹⁸ *Ibid*, Article2(4).

¹⁹ United Nations General Assembly Resolution 2131 (XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. On line at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/218/94/IMG/NR021894.pdf>. Accessed 13 Apr 04.

²⁰ UNSCR 82 (1950) on line at <http://ods-dds-ny.un.org/RESOLUTION/GEN/NRO/064/95/IMG/NRO/06495.pdf>. Accessed 22 Jun 04.

²¹ UNSCR 83 (1950) on line at <http://ods-dds-ny.un.org/RESOLUTION/GEN/NRO/064/96/IMG/NRO/06496.pdf>. Accessed 22 Jun 04.

²² UNSCR 84 (1950) on line at <http://ods-dds-ny.un.org/RESOLUTION/GEN/NRO/064/97/IMG/NRO/06497.pdf>. Accessed 22 Jun 04.

²³ UNSCR 146(1960). On line at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/157/32/IMG/NRO15732.pdf>. Accessed 24 Jun 04.

²⁴ L Melvern, 'The Security Council: Behind the Scenes' in *International Affairs*, Vol 77, No 1 (2001), p101.

²⁵ M Boot, 'Paving the Road to Hell –The Failure of UN Peacekeeping.' in *Foreign Affairs*, Vol 79 No 2 Mar/Apr 2000. Online at <http://www.foreignaffairs.org/20000301fareviewessay34/max-boot/paving-the-road-to-hell-the-failure-of-u-n-peacekeeping.html>. Accessed 15 Oct 04.

²⁶ Mats Berdal, 'The UN Security Council: Ineffective but Indispensable.' in *Survival* Vol 45, No 2, Summer 2003, p8.

²⁷ A Patil, *The UN Veto in World Affairs1946-1990. A Complete Record and Case Histories of the Security Council's Veto* (London: Mansell Publishing, 1992), p11

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²⁸ Memo from Secretary of State Edward R Stettinius Jr to President Harry S Truman, 1 Jun 1945. On line at http://www.trumalibrary.org/whistlestop/study_collections/un/large/sf_conference/un_sf14_1.htm. Accessed 18 May 04.

²⁹ *Ibid.*

³⁰ Memo from Secretary of State Edward R Stettinius Jr to President Harry S Truman, 2 Jun 1945. On line at http://www.trumalibrary.org/whistlestop/study_collections/un/large/sf_conference/un_sf17_1.htm. Accessed 18 May 04.

³¹ Memo from Secretary of State Edward R Stettinius Jr to President Harry S Truman, 8 Jun 1945. On line at http://www.trumalibrary.org/whistlestop/study_collections/un/large/sf_conference/un_sf18_1.htm. Accessed 18 May 04.

³² UN Document 922/III/1/45, dated 12 Jun, 1945, page 5, cited in A Patil, *op cit*, p12.

³³ UN Document 936/III/1/44, dated 12 June 1945, page 4, cited *id.*

³⁴ UN Document 936/III/1/45, dated 12 Jun 1945, page 5, cited *id.*

³⁵ UN Document 956/III/1/47, dated 13 Jun 1945, cited *ibid* p13.

³⁶ *Id.*

³⁷ Sydney Bailey, *The United Nations: A Short political Guide*, (Basingstoke: MacMillan, 2nd Edition 1989) p19.

³⁸ A Patil, *op cit*, pp467-469.

³⁹ *Ibid*, p486.

⁴⁰ Global Issues Research Group, *Table of Vetoed Draft Resolutions in the United Nations Security Council, 1946-2002* (London: Foreign & Commonwealth Office, 2003), pp2-4.

⁴¹ *Ibid*, p5.

⁴² Hansard House of Commons Debates for Thu 6 Sep 1990, Column735. On line at <http://www.parliament.the-stationery-office.co.uk/pa/cm198990/cmhansrd/1990-09-06/Debate-1.html>. Accessed 24 Jun 04.

⁴³ See, in particular, interventions by Tony Benn and Tam Dalyell, *ibid* at Column 737.

⁴⁴ *Ibid*, at Column 744.

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⁴⁷ UNSCR 660 (1990) on line at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO57528.pdf>. Accessed 24 Jun 04.

⁴⁸ Global Issues Research Group, *op cit*, p40.

⁴⁹ *Ibid*, pp40-42.

⁵⁰ UN Press Release, SC/7696, 4721st Meeting of the Security Council, 19 Mar 03. On line at <http://www.un.org/News/Press/docs/2003/sc7696.doc.htm>. Accessed 28 Jul 04.

⁵¹ Hansard House of Commons Debates for Tue 18 Mar 2003, Column 764. On line at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/vo030318/debtext/30318-07.htm>. Accessed on-line 27 Jul 04.

⁵² UN Security Council : Algeria and Libyan Arab Jamahiriya: draft resolution (S/2004/240). On line at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/286/08/PDF/N0428608.pdf>. Accessed 28 Jul 04.

⁵³ UN Press Release SC/8039, 4934th Meeting of the Security Council, 25 March 2004. On line at <http://www.un.org/News/Press/docs/2004/sc8039.doc.htm>. Accessed 28 Jul 04.

⁵⁴ G Kolko cited in S Schlesinger, *Act of Creation. The Founding of the United Nations* (Oxford: Westview Press, 2003), p284.

⁵⁵ S Schlesinger, *op cit*, p240.

⁵⁶ Charter of the United Nations. Article 43. On line at <http://www.un.org/aboutun/charter/index.html>. Accessed 2 Aug 04.

⁵⁷ *Ibid*, Article 47.

⁵⁸ E Luard, *op cit*, p98.

⁵⁹ UNSCR 1 (1946) 26 Jan 1946. On line at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/036/64/IMG/NR003664.pdf?OpenElement>. Accessed 2 Aug 04.

⁶⁰ *Id.*

⁶¹ E Luard, *op cit*, pp 98-105.

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- ⁶² UNSCR 665 (1990), 25 Aug 1990. On line at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/15/IMG/NR057515.pdf?OpenElement>. Accessed 2 Aug 04.
- ⁶³ B Boutros-Ghali, *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-keeping*, United Nations Document A/47/277-S/24111 dated 17 Jun 1992. Para 3. On line at <http://www.un.org/Docs/SG/agpeace.html>. Accessed 3 Aug 04.
- ⁶⁴ *Ibid*, Para 43.
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- ⁶⁶ *Report of the Panel on United Nations Peace Operations* (The Brahimi Report), UN Document A/55/305 – S 2000/809. On line at http://www.un.org/peace/reports/peace_operations/. Accessed 3 Aug 04.
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
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CHAPTER 3: FUTURE CONFLICT AND ISSUES OF *JUS AD BELLUM*

3.1 Introductory Comments

The foregoing chapters have sought to make the case that a requirement remains both for moral justification for the occasion of the use of armed force and moral restraint in the nature of its use. The remainder of this thesis will now consider the challenges presented by contemporary conflict in order to assess the suitability of the just war doctrine for providing that moral framework. An attempt will first be made to outline the principal characteristics of contemporary and near-future warfare. The implications of these for the just war doctrine will then be considered. Issues of *jus ad bellum* will be examined first, followed by those of *jus in bello*. However, it is recognised that in reality rarely can the two be so simply separated; conduct of a war often impacts on its legitimacy.

3.2 Future War

Predicting the nature of future conflict is likely to hold as many pitfalls for the ethicist as it so often has for the strategist. In 1999 James Turner Johnson characterised contemporary warfare as taking

the form of local conflicts, more often than not civil wars, in which no great alliances of nations are involved; these have been wars fought for reasons based in local rivalries, typically inflamed by historical animosities, ethnic disparity, or religious difference, rather than for reasons of global *realpolitik*; they have been fought not with nuclear weapons (or, indeed, other types of weapons of mass-destructive capability) or the latest in military technology, but instead with conventional weaponry, often of old design, and often limited to the rifles, knives, grenades, and light, crew-served weapons which individual soldiers can carry on their persons. A further feature of empirical contemporary warfare is that it involves face-to-face uses of military power by the participants against one another, not the remote destruction of distant, unseen, and often abstract targets.¹

Whilst this is a fair description of the majority of conflicts of the last decade of the Twentieth Century, looking back from just halfway through the first decade of the new millennium this looks woefully incomplete. Similarly, Mary Kaldor argues that ‘(t)he

problems of mobilization and inflexibility, and the risks of attrition, have been magnified in the post war period, making it almost prohibitive to mount a major operation except against a clearly inferior enemy, as in the Falklands/Malvinas war of 1982 or the Gulf operation of 1991.² Yet, in fact, in neither of these cases was the enemy obviously or demonstrably inferior at the outset of the campaign. Kaldor aims to describe contemporary conflict in terms of 'New Wars' characterised by goals of 'identity politics in contrast to the geo-political or ideological goals of earlier wars.'³ Moreover, in their conduct, they are characterised by an attempt to destabilize through fear and hatred:

The aim is to control the population by getting rid of everyone of a different identity (and indeed a different opinion). Hence the strategic goal of these wars is population expulsion through various means such as mass killing, forcible resettlement, as well as a range of political, psychological and economic techniques of intimidation.⁴

There are important aspects in the picture painted by Kaldor for our consideration of the challenges presented to just war, but it is equally important to recognise that, like Turner's, Kaldor's description of contemporary warfare is not a complete picture of what has come to pass or is likely to in the immediate future: 'New Wars' are but part of the landscape.

What is clear, though, is that there can be little expectation of an end to conflict. Picking up on Sir Henry Maine's mid-nineteenth century observation that 'War appears to be as old as mankind, but peace is a modern invention'⁵ Sir Michael Howard notes that:

In the last decade of the twentieth century the liberal inheritors of the Enlightenment seemed once again poised to establish peace. ... No alternative model for a world order was on offer: that of Kant and his disciples seemed to have triumphed over all its competitors. ... The consensus seemed cemented by the challenge from Saddam Hussein, ..., against whom the United Nations came together under US leadership to show a collective security considerably more credible than that evoked by the Korean challenge in 1950.⁶

Against this background Francis Fukayama made his famously premature announcement of 'the end of history.'⁷ Yet, as Sir Michael continues '(w)ithin a decade, the general mood had turned sour, and the new millennium was to be greeted with apprehension rather than hope.'⁸ If this study is to proceed, then, it must make

some tentative predictions about the nature of conflict in the foreseeable future but it must do so with caution and caveat.

It has become something of a cliché to claim that the nature of war, as indeed of international relations in general, underwent a revolutionary change with the collapse of the Soviet bloc at the end of the 1980s. Many would argue that a further paradigm shift was marked by the terrorist attacks on the World Trade Centre and the Pentagon on September 11th 2001. As with all clichés there is, of course, a considerable element of truth in these claims but, again as with all clichés, they belie the subtlety of reality. It is often held, for example, that whilst the Cold War nuclear stand-off held the spectre of global nuclear annihilation over the World, it also kept the lid on simmering local hostilities that were then to explode into open conflict in the 1990s. Consideration of the very many conflicts throughout the Cold War era in Africa, South-East Asia, Latin America and the Middle East, however, renders this a rather incomplete analysis. So we must recognize in looking at new challenges, that there are likely also to be many continuities. Indeed this is the central thesis of Colin S Gray's comprehensive treatment of future war *Another Bloody Century*: 'Historical perspective is the only protection we have against undue capture by the concerns and fashionable ideas of today. These concerns and ideas may be valid and important for now, but they are inadequate as a basis for understanding future warfare.'⁹

There is a considerable body of literature discussing the Revolution in Military Affairs (RMA) and likening the advent of 'information age' warfare to the RMAs effected by the widespread adoption of firearms in the 17th Century or by the industrialization of warfare in the 19th Century. In fact, though, these technological changes only appear revolutionary in (fairly distant) hindsight. The reality is a much more gradual, evolutionary change. Where truly revolutionary changes have occurred in military – or more properly strategic – affairs they have resulted from a juxtaposition of military-technical with profound politico-sociological change, such as the adoption by revolutionary France of the *levee en-masse*. Colin Gray warns that '(t)here is a perennial temptation to misread recent and contemporary trends in warfare as signals of some momentous, radical shift. As often as not, the character of warfare in a period is shaped,

even driven, much more by the political, social, and strategic contexts than it is by changes integral to military science.’¹⁰ The current dramatic change in the nature of conflict is, argues Chris Donnelly¹¹, the result of range of factors, principal among which are the emergence of new threats to security, rapid and profound social change (characterised by the globalisation of our economy), the narrow technical revolution in military capabilities, and a shift in strategic focus from Central Europe to the so-called ‘Arc of Instability.’

NATO’s new *Strategic Concept*¹² – unveiled in 1999 to replace that articulated in 1991 as the Alliance’s initial response to the ending of the Cold War – identified a range of ‘new’ (or perhaps erstwhile suppressed) challenges to the West’s security. Whilst it perceived ‘large scale conventional aggression against the Alliance’¹³ as unlikely – though not inconceivable – it noted a ‘variety of military and non-military risks which are multi-directional and often difficult to predict.’¹⁴ ‘Ethnic and religious rivalries, territorial disputes, inadequate or failed efforts at reform, the abuse of human rights, and the dissolution of states’ were all seen as elements that could result in ‘local or even regional instability. The resulting tensions could lead to crises affecting Euro-Atlantic stability, to human suffering and to armed conflicts.’¹⁵ It further listed the ‘proliferation of NBC weapons and their means of delivery,’¹⁶ noting in particular the potential for their development and use by non-state actors, and on the global spread of technology, in general, that could lead to ‘greater availability of sophisticated military capabilities.’¹⁷ Finally, the *Strategic Concept* acknowledges the threat posed by wider factors such as ‘terrorism, sabotage, and organised crime’¹⁸, refugee flows and disruption to essential resource supplies.

Three issues of relevance to this thesis fall readily out of NATO’s 1999 characterisation of the new security environment. Firstly, the threat is no longer purely military in nature and much of it results from the internal situation of states of concern; security is no longer equivalent to defence. Thus it is insufficient to meet it with territorial-oriented deterrent forces. Active involvement – indeed, even military intervention – in the erstwhile sacrosanct affairs of other states may now be a necessary facet of our own

defence. This resonates with the emerging doctrine of humanitarian intervention as a result of the shifting value set, examined in Chapter 2 (See Section 2.2.4).

Secondly, proliferation extends the number and geographic spread of potential threat states. Thus the requirement must be of a readiness to engage in conflict anywhere in the world and no longer just within narrowly-defined regional spheres of interest. This requires not only rapidly deployable expeditionary forces rather than a reliance on home- or regionally-based forces, but also a wider intelligence net and a greater understanding of a wider range of cultures and approaches to warfare. It raises the prospect of a requirement for pre-emptive action because of the danger from widespread ownership of weapons of mass destructive effect which may devastate in an initial attack, and from enemies whose culture may make deterrence policies non-effective. There is also a threat from non-state entities – and possibly even states – whose culture makes them unconcerned by personal danger or death. It is difficult for those of us living in a post-heroic age in the West fully to comprehend a heroic culture in which personal austerity and suffering, glory, ‘patriotism’ (though not necessarily for a ‘patri’ in the modern Western sense, rather ‘cause’ or God) – are significant facets of motivation. This is the culture most dramatically exemplified by suicide bombers. At the tactical level this makes them infinitely more difficult to fight than the terrorist we have been used to – whose vulnerability was his desire to escape unharmed; at the strategic level it makes for an enemy unaffected by attempts at deterrence and maybe even coercion. Such circumstances may, then, demand admittance of pre-emption as part of our moral paradigm for use of force.

Whilst the NATO analysis is focussed on nuclear, biological and chemical (NBC)* weapons and on the spread of the technologies that underpin sophisticated weapon systems, we should add to this the rapid spread of cheap, simple weapons that in some parts of the world have made almost every person, including many children, potential participants in armed conflict. For, as Herfried Münkler suggests,

(t)he fact that children, many of them under fourteen years, can be used at all in military hostilities is due not least to the technical development in firearms,

*Recently this terminology has evolved and it is now more normal to talk of Chemical, Biological, Radiological and Nuclear (CBRN).

whose average weight has continually fallen at the same time that firing frequency has increased. They have also been shrinking in size, so that many look as though they were specially designed for children rather than adults.¹⁹

This adds to the third issue to fall from the NATO analysis: the emergence of non-state actors as significant potential adversaries, which will in turn throw up a range of ethical questions both in terms of how, and against whom/what, we respond militarily and how we can expect hostilities to be conducted.

A further issue related to technology, not considered in the NATO analysis but of great relevance to this thesis, is the degree to which for Western nations there has been a growth of weapons technology that places distance between the operator and the intended victim. This is an asymmetry in warfare that has always been sought and today hands this particular advantage to modern sophisticated military forces – in essence those of the Western industrialized nations. However, not only has this forced potential adversaries to seek asymmetries of their own, but it also raises issues of *jus in bello*: there is a danger, that in attempting to place the soldier/sailor/airman out of harm's way we at the same time relegate him to the status of technician – no longer party to a warrior code – and remove his ability to act as moral agent on the battlefield. This issue will be considered in detail in Chapter 4.

Accepting that the 'new wars' postulated by Kaldor²⁰ and others is an incomplete picture and that such a model for conflict might better be regarded as having augmented rather than supplanted the traditional model, there is nevertheless a clear need to examine the character of these 'new wars'. A failing in most of the literature on the so-called Revolution in Military Affairs is that it has sought to address technological change in isolation from socio-political; it addresses the effect of technological development only in terms of traditional warfare, failing to consider the impact of new wars. Thus it has led, on the part of some, to a potentially false assumption about the West's (and particularly the US's) superiority in weapons and information technology leading inevitably to military supremacy. The concept of New World Order – intervention by a militarily invincible West in the name of democracy and universal human rights – is predicated on this as much as it is on major power consensus. The reality – a far more wide-ranging paradigm-shift in the nature of conflict – has rendered

that invincibility dubious (as demonstrated most cruelly in Mogadishu in 1993) and made technological advantage, except in the increasingly rare incidents of symmetric state-on-state conflict, far less relevant than expected. Furthermore, as Gray notes, the most technologically advanced weaponry is only effective in the hands of well trained troops, adequately imbued with the will to fight²¹ (which connects with the discussion in Chapter 2, Section 2.3.3 , on the importance at the individual level of moral justification for conflict, and its moral conduct.)

Münkler suggests there has been a gradual change in which states have given up (or had wrested from them) their de-facto monopoly of war to para-state and private actors including a new breed of military entrepreneurs. Many new wars can be seen to have economic foundations. Ethnic-cultural tensions and religious factors are invariably present but more often than not are themselves a resource for the warlords than a genuine *causus bellum*.²² Three principal characteristics can be identified in new wars: de-statization, that is the proliferation and increasing importance of non-state-actors; asymmetry, in particular the attempt to focus violence on the weak and vulnerable, as a matter of deliberate policy, rather than against the enemy's military forces; and thirdly the 'automization of forms of violence that used to be part of a single military system.'²³ That is the use of guerrilla warfare and terrorism, once tactical options, as strategic ends in their own right.

The statization of war, roughly speaking from the Thirty Years War onwards, resulted in the establishing of boundaries and demarcations that its modern de-statization is seeing eroded. As states' territorial boundaries were formally established, so it became possible to delineate between peace and war (marked by the crossing of one state's borders by the forces of another); and also between friend and enemy. Second order distinctions were then possible: between combatant and non-combatant; between allowable acts of violence in war and other, criminal, acts of violence; and between acts of violence and war on the one hand and acts of trade and commerce on the other. Now, as states' monopoly on warfare decreases, these distinctions again become blurred.

One consequence of the blurring of distinctions and the increasing importance of non-state actors, is that clearly identifying a principal cause of conflict, and thus seeing the way to peaceful resolution, is all the more difficult. Münkler argues that ‘the impenetrable web of motives and causes, which often leaves no prospect of lasting peace, is a direct consequence of the fact that it is not states but para-state players that confront one another in the new wars.’²⁴ Paul Richards²⁵ would concur: none of the mono-causal theories advanced in explanation of new wars really holds up. If it were, as is often argued, scarcity of resources that provoked violent conflict, then the arrival of international aid should conclude it. In fact, argues Richards²⁶, there is plenty of empirical evidence to contradict this; international aid often itself becomes a resource in the conflict. Richards also rejects the so-called ‘new barbarism’ thesis – that new wars are simply the re-emergence of ancient rivalries and hatreds held artificially in-check by the Cold War. ‘Ethnic consciousness’ he suggests ‘emerges at the boundary between groups rather than being something intrinsic to the group itself.’²⁷ In other words the fracture lines need to be in place in order to highlight the ethnic divide, not the other way around. Michael Ignatieff has argued similarly²⁸. Richards finds the ‘greed-not-grievance’ thesis similarly unconvincing and, thus highlighting the inadequacy of mono-causal explanations, proposes that ‘(new) war only makes sense as an aspect of social process’²⁹ Richards’ view of new war, then, is of war and peace as part of a continuum that lacks precise boundaries:

(P)re war peace is often more delicate and finely balanced than appreciated, and .. the seeds of war are to be seen shooting up in peace; ... the shift towards intense armed conflict is a process with many twists and turns (and significant pauses, relevant as opportunities for peace makers); ... conflict is sustained by an emergent sociology and economy of war; .. turning back towards peace, even beyond a peace agreement, is a rocky path with many pitfalls; ... the hidden or silent violence behind the conflict has to be addressed if peace is to be sustained (justice matters);’³⁰

This would concur with Münkler’s view that a key defining facet of new wars is their lack of boundaries and distinctions, which were effected by the statization of war and are now eroded by its increasing destatization. It would also support an argument for pre-emptive action; peacekeeping today cannot be simply about consensual separation. Nor, if war is a social process rather than a discontinuity sparked by particular causes or

circumstances, can causes be simply addressed; rather social processes must be adjusted which may require long-term engagement.

A further consequence of the growing prominence of non-state and para-state actors is that the West will find itself increasingly engaged with entities which are neither bound by international law nor so susceptible to the motivations (examined in Chapter 2) for conforming to ethical norms. Some but not all of the motivations to self-restraint, on either cause or conduct, will apply.

From the perspective of this thesis, if Western states are obliged to engage in conflict with non-state actors there may be the need to violate the sovereignty and territorial integrity of those states from within whose borders, by consent or not, those actors operate. The blurring of distinctions between combatant and non-combatant will, similarly, impact on issues of *jus in bello*, whilst the lack of distinction between acts of war and acts of crime will complicate attempts to act within the established legal framework; what set of rules applies in complex conflict situations, the law of armed conflict, the domestic law of the state (possibly failed) in whose territory operations are occurring, or that of the intervening country? Inter-state wars have a clearly defined beginning – usually a declaration of war, or the violation of a border – and end – an armistice and peace treaty. This gives them a legal identity and defines the limits of applicability of the laws of war and of peace. New wars are much less amenable of such distinction, resulting in legal ambiguity. Such legal ambiguity may make moral understanding all the more important. The concept of war and peace as part of an ill-defined continuum of social interaction, alluded to above, would also undermine the case for separate laws for war and for peace. As has become increasingly apparent for US and British forces in Iraq, rules of engagement for ‘peace’ and for ‘war’ make for a highly complex and difficult situation when the nature of conflict ebbs and flows. Again, this heightens the requirement for a deep-seated moral understanding (thus allowing first-principles judgements to be made) underpinning military conduct and action. Furthermore, it is an inevitable feature of new wars, given the multiplicity of protagonists and interests at play, that they are only truly over when the overwhelming majority of people behave as if they were.³¹ The defining power thus rests with a

minority and all parties have to be satisfied that they have more to gain from peace than from continuation of the conflict. In such circumstances the peace is likely to be fragile, and beyond the means of the state apparatus to enforce. This will result in the requirement for an outside power to underwrite the peace process, more often than not with military force. We must expect, then, a continued requirement for military intervention to ensure the spread of peace and security.

As with European wars before their 17th Century statization, most of the violence of new wars is inflicted not on the military forces of the opposing side, but on the civilian population. Kaldor calculates that whereas ‘(a)t the beginning of the twentieth century, 85-90 per cent of casualties in war were military’*. ... (b)y the late 1990s, the proportions of a hundred years ago (had) been almost exactly reversed, so that nowadays approximately 80 per cent of all casualties in wars are civilian.’³² Again, as with pre-Westphalian Europe, this is not a matter of a significant number of unfortunate accidental consequences of war, but a matter of deliberate targeting. Whether the result of a policy of ‘cleansing’ or eradication, or in order to force support for one side or other, the civilian population has become the primary target in new wars. As General Sir Rupert Smith says: ‘The battlefield is increasingly conducted amongst ‘the people’. ‘The people’ are now part of the battlefield, or ‘the people’ are treated as an adversary and driven out (as revealed, for instance, in recent practices of ethnic cleansing).’³³ A fundamental tenet of *jus in bello* is being not simply flouted but turned on its head. Worse, as such violence is carried out in order to intimidate and terrorise, it is invariably extreme and uncontrolled; a breakdown or absence of discipline – itself a consequence of the involvement of non-professional forces – tends towards an orgy of violence and sexual abuse inflicted on a largely undefended population. All of this is often further exacerbated by the growing role played by so-called ‘child soldiers’: dispossessed adolescents brought up in a moral vacuum and an atmosphere of testosterone, aggression and hatred. The particular impact of child soldiers will be considered in detail in Chapter 4.

* We should note, however, that for major wars such as the First World War a large proportion of these will only have been military by virtue of the war – they were conscripts not professional soldiers.

We might further note, in support of Münkler's assertion of similarity between new wars and those of pre-Thirty Years War Europe, that the tendency to try to reduce losses by the engaging force, even at the expense of the civilian population, can be seen both in the West's seeking to engage predominantly from the air or at least from distance on the ground, and in the methods of terrorists and insurgents. (This point is not intended in any way to equate Western military intervention to the actions of terrorists and insurgents, merely to note that in both cases, the imperative to minimise own force casualties impacts directly on the civilian population, just as was the case before and during the Thirty Years War.)

Not only the New wars that have emerged in Africa, South East Asia and the Balkans, but also the terrorist campaign waged by Islamic extremists against (predominantly) the West, have exemplified a lack of restraint in either target or method of attack. The contrast with what has gone before was described thus by UK Defence Secretary John Reid³⁴:

The enemy our parents and grandparents faced ... wore a different uniform to theirs, but had aims and, by and large, had conduct they could understand. The enemy fought much as we fought; his forces were structured much the same way. And, by and large, they accepted the same conventions. Today's most dangerous, global enemy, the terrorist*, does not.

....

We face an adversary:

- Which revels in mass murder;
- Which sets out to cause the greatest pain it can to innocent people;
- Which is entirely unconstrained by any law;
- Which sees all civilians, including women and children not as non-combatants but as easy targets;
- Which sees terror as a key part of its arsenal, and
- Which both glorifies and operates suicide bombers.

It is an enemy unfettered by any sense of morality

The lack of distinction between acts of war and acts of crime means that military forces will find themselves not only engaged in traditional and non-traditional combat operations, but needing, too, to deal with organised crime, drug production and transportation, and human-trafficking. The nature of contemporary *security* challenges,

* And the same is true of many other protagonists in New Wars.

much wider than traditional *defence* issues, will result in a need ‘to collaborate not only with forces from other countries but also with civilian, non-governmental relief providers.’³⁵ The omnipresent nature of the media adds further to this dimension. The ability of non-state actors to influence the decision-making process in, particularly, democratic states through media impact on public-opinion, plays a key role in the development of ‘asymmetric’* warfare. The so-called ‘Mogadishu-effect’ after the US withdrawal from Somalia following the very public and brutal killing of eighteen US soldiers in 1993³⁶ is a glaring example of the West’s potential vulnerability to this. Instead of traditional war reporting we have a reporting war³⁷ which provokes and promotes the use of media events such as hostage-taking and highly stage-managed executions such as those seen in Iraq throughout 2004-2005.

The use of the media to further the ends of an unconventional enemy was also referred to by John Reid, highlighting the difficulties faced by the armed forces of democratic nations: ‘Our adversary will try to achieve his aims by using our very freedoms against us. It sees the free Western media as a virtual battleground in itself – where swaying of public opinion away from support from our campaigns can be the path to a swift victory; a quick way of undermining our public morale and endurance.’³⁸

Not only does the West’s modern adversary exploit the free media, but he can combine this with an exploitation of a legal asymmetry: he is unconstrained by international law, whilst Western forces are bound – indeed, some even feel shackled – by it. This exploitation of a perceived weakness has been termed ‘lawfare’ by US Air Force Judge Advocate Brigadier General Charles Dunlap.³⁹

The final issue that must be raised here is the economic dimension of contemporary conflict. The destatization of warfare has (re-)introduced a factor hitherto of only marginal relevance (there have always been those who have been able to draw economic profit on the margins of war); that is an economic motivation for its continuance. New wars demonstrate a commercialization/privatisation that replaces

* The term ‘asymmetric warfare’ is used as it is common parlance; however, the author has great reservations on its value. This will be discussed in the next chapter.

political and patriotic motivation with financial.⁴⁰ If financial gain for some has been a concomitant of 'old' wars, it has become a central focus in 'new' ones. Conflict provides the environment in which opportunistic warlords can gain enormous commercial benefit through drug and human trafficking as well as the more conventional trade in arms.⁴¹ The nature of the economy generated by the new wars also dictates their character. Because they rely upon 'exploitative forms of financing ... (which) depends on an atmosphere of insecurity, (there is) a vested interest in perpetuating violence.'⁴² In such circumstances there is a danger of a direct effect on otherwise non-involved Western nations: through the impact on society of drugs, prostitution, extortion and gun-running and on the economy through the black market, trade in counterfeit goods, smuggling and excise evasion. This adds to the will (arguably the necessity) to intervene; such intervention becomes, in effect, not only a humanitarian imperative but a form of self-defence. However, it also calls for close examination of the nature of intervention. There is a very real, and well-evidenced, danger that relief aid provided by well-meaning (predominantly) Western governments and NGOs can become just another resource to the commercially-driven protagonists.⁴³ Again, there is an interplay between the *jus in bello* and *jus ad bellum* of any intervention: a purely 'humanitarian' intervention consisting of providing relief aid to a war zone may simply fuel the fire by providing a further resource, control of which becomes a battleground in its own right. A just war intervention – one that genuinely seeks a better peace – might require a greater involvement: the capacity not only to deliver aid but tightly to control its onward distribution and consumption.

From the foregoing analysis of the emerging character of future war a number of issues can be drawn out that confront, challenge or, indeed, may reinforce our understanding of just war. Firstly there are two key issues for *jus ad bellum*, which will be considered in the remainder of this chapter: the right of intervention and the case of anticipatory or pre-emptive action. The next chapter will then consider the issues arising for *jus in bello*: the impact of technology; the changing nature of protagonists; the consequences of (perceived) casualty aversion; and the moral complexities that arise in combating an enemy who uses asymmetrical means.

3.3 Humanitarian Intervention

3.3.1 The Legal Stay to Intervention

Just war doctrine offers no stay on intervention *per se* but, as Chapter 1 has shown, it has been adapted over time gradually to place ever greater restriction on a state's *jus ad bellum* until replaced by a legal code that very clearly prohibits intervention in all but the most limited circumstances. International norms on use of force have developed from the traditional Christian understanding of just war, as encapsulated in the work of Augustine and Aquinas, to what Walzer (and others) have termed the legalist paradigm^{*}. In outline this states that⁴⁴:

1. There exists a society of independent states.
2. This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty.
3. Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
4. Aggression justifies two kinds of response: a war of self defence by the victim and a war of law-enforcement by the victim and any other member of international society.
5. Nothing but aggression can justify war.
6. Once the aggressor state has been militarily repulsed, it can also be punished.

This ethic has been codified most clearly in the Charter of the United Nations: ‘All members shall refrain in their international relations from *the threat or use of force against the territorial integrity or political independence* of any state, or in any other manner inconsistent with the Purposes of the United Nations’⁴⁵ (emphasis added). Furthermore, ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...’⁴⁶ Should clarification be necessary then it is to be found in General Assembly Resolution 2131 (XX): ‘... armed intervention and all forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.’⁴⁷

^{*} Walzer concedes that the *legalist paradigm* as a basic statement of the theory of aggression is incomplete.

The UN Charter paradigm does, of course, allow for the use of force. In addition to using force in their own self defence (but only ‘until the Security Council has taken measures necessary....’⁴⁸), states may use force collectively or individually under UN auspices when the UN Security Council determines ‘the existence of any threat to the peace, breach of the peace or act of aggression’⁴⁹ that cannot be resolved but by use of force. In fact, though, as General Sir Hugh Beach has pointed out⁵⁰

UN Peacekeeping – much the most frequent use of armed force under the aegis of the United Nations* – falls into neither of these categories. There is no explicit warrant for such action in the Charter and it has had to be improvised on the hoof. The key features are:

- the more or less voluntary consent of all parties to the presence and activities of the mission;
- the peacekeepers’ impartiality in relation to the parties;
- the minimum use of force, only in the last resort and only in self-defence. They have no enemies and they are not there to win.

The key thing of note is that both morally and legally the focus in the legalist paradigm is on the personality of the state. Even peacekeeping, despite its humanitarian intent, is at the behest or at least with the consent of the states-party; it offers no mechanism for intervention on behalf of individuals or groups of people(s) under threat from the state, internally. In Walzer’s characterisation of the legalist paradigm, collective action is interpreted as law enforcement – giving it a direct analogy with the situation in national law. However, just as national police forces were (and still are in many countries) reluctant to intervene in ‘domestic’ issues, the UN has been prohibited by its Charter from unsolicited intervention in the ‘domestic’ issues of its member states. The ‘aggression’ to which Walzer refers is, in international legal terms, aggression by states against states. This does not sit comfortably, indeed it cannot be squared at all, with the value-set emergent at the end of the second millennium that has placed the premium on the rights of the individual. This would require a much broader understanding of ‘aggression’ to include the internal aggression of states or sub-state groups against individuals or groups within a state.

* As at 16 Apr 2006 the UN listed (<http://www.un.org/Depts/dpko/dpko/index.asp>) a total of 45 concluded and 15 on-going ‘peacekeeping’ missions.

Chapter 2 (see Section 2.2) examined in detail the failings of the legalist paradigm as it is represented in the UN Charter model. To summarise, the Charter model has failed because of its inherent structural limitations – most particularly the veto enjoyed (and too often inappropriately used) by the P5; because it lacks the enforcement mechanisms necessary to complete the analogy with domestic law; because too little faith has been shown in the institutions for peaceful dispute resolution; because of a changed value-set that places individuals not states at the heart of the system; and because it was designed to meet the needs of an age when inter-state aggression was perceived as the most likely threat to peace and has proved incapable of meeting the demands of a changed world in which internal strife, state oppression of minorities, failed or failing states are now perceived as the greater threat. The discussion at Section 3.2 , above, concluded that in the geo-strategic environment that has emerged since the end of the Cold War, the security of Western nations can no longer be taken to be synonymous with territorial defence. In view of the broader threats to security and in particular the repercussions of failing states, intervention may not only be a humanitarian requirement but a matter of self-defence. A will, arguably an imperative, to intervene has emerged that neither the mechanisms nor the institutions of the UN Charter paradigm have been able to support.

3.3.2 The Will to Intervene

It is commonly held that the ending of the Cold War super-power stand-off created the conditions for intervention; that the Bosnian wars of the mid-1990s focussed Western attention; and that NATO's intervention in Kosovo was the watershed. In fact there is plenty of evidence of earlier intervention, with justification at least partially based on humanitarian grounds. Africa provides several suitable examples, such as the Tanzanian deposition of Idi Amin in Uganda (1979)⁵¹ and more recently Rwandan, Ugandan and Angolan intervention in Zaire/Democratic Republic of Congo.⁵² Nor were the 1990s the first occasion on which the UN and the international community had felt it necessary to examine the issue of intervention. There was substantial debate on the issue following the 1971 Indian intervention in (then) East Pakistan. Setting the scene for deliberations that followed that intervention, John P Humphries summarised the historical situation thus:

What a state did to (its nationals) was its own business and beyond the reach of international law ... (but) there may have been an exception to the rule. If ... a State treated its nationals in such a manner as to *shock the conscience of mankind*, other states could intervene, if necessary by force ... This was called humanitarian intervention. There were a number of such interventions, particularly in the nineteenth century; but, partly because most if not all of them were motivated by political considerations that had nothing to do with human rights, it is questionable whether so-called humanitarian intervention was ever recognised as an institution of the law of nations.⁵³

So, considerations of the need to intervene contrary to the proscription of the UN Charter, is not as new as might be supposed. Nevertheless, the end of the Cold War saw a coincidence of an emerging consciousness of individual rights, a geo-strategic environment much more amenable than erstwhile to military intervention, with a renewed outbreak of internal strife not only in those places where it was endemic but also, perhaps most importantly, in the Balkans – the West’s ‘backyard’. Geographic proximity coupled with blanket media coverage, gave the conflict and especially the atrocities of the Balkans an immediacy that the West could no longer ignore.

Already in 1991, anticipating the mood-change and in the light of the first true act of successful collective defence under UN auspices, then UN Secretary General Javier Perez de Cuellar argued that there had been a ‘shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents’.⁵⁴ (and see p100).

The theme was continued by de Cuellar’s successor, Boutros Boutros-Ghali who called into question the absoluteness of state sovereignty in his *Agenda for Peace*⁵⁵:

Respect for (the State’s) fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; ... It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.

The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead.

Further evidence of a shift of conscience, or consciousness, in the last decades of the Twentieth Century can be seen by contrasting the US Conference of Catholic Bishops' Pastoral Letter of 1983 entitled *The Challenge of Peace*⁵⁶, with the statement they released on its tenth Anniversary, *The Harvest of Justice is Sown in Peace*.⁵⁷ The Pastoral Letter addressed issues of war and peace in a nuclear age. Drawing heavily on traditional just war doctrine it sought, nevertheless, to highlight the likelihood of nuclear holocaust in the event of international conflict and to promote a presumption against war. There is no real discussion in the letter of the possibility of forcible intervention in the interests of justice or humanity. The 1993 paper, in contrast, whilst recognising the contrasting traditions in Christianity of just war and non-violence, focuses greatly on peacemaking and on universalist concepts of humanity, justice and human rights (the grounds on which so many calls to armed intervention have been justified):

The millions and millions of people killed just in this century in war or by repressive regimes are ample proof that we must chart a new path to peace and justice. Pope John Paul II outlined this challenge this year in Denver,

[T]he international community ought to establish more effective structures for maintaining and promoting justice and peace. This implies that a concept of strategic interest should evolve which is based on the full development of peoples — out of poverty and toward a more dignified existence, out of injustice and exploitation toward fuller respect for the human person and the defense of universal human rights.¹⁷

As we consider a new vision of the international community, five areas deserve special attention:

1. strengthening global institutions,
2. securing human rights,
3. assuring sustainable and equitable development,
4. restraining nationalism and eliminating religious violence and
5. building cooperative security.⁵⁸

This all suggests a much more interventionist stance, a greater readiness to accept the need for armed force, and a valuing of justice over sovereignty.

The new ambiguity towards sovereignty together with the spirit of internationalism demonstrated in Tony Blair's 'Chicago Speech' (see p101) are further reflected in statements and writings of Boutros-Ghali's successor, Kofi Annan, with the added insight from the UN's failures in Bosnia and NATO's unsanctioned (by the UN) intervention in Kosovo. Whilst acknowledging the fears of those who saw greatest threat in the prospect of intervention un-shackled by international law, Annan clearly articulated before the General Assembly a view that state sovereignty could no longer take automatic precedence over individual rights:

While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community.

It has cast in stark relief the dilemma of what has been called "humanitarian intervention": on the one side, the question of the legitimacy of action taken by a regional organization without a U.N. mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests was a tragedy. It has revealed the core challenge to the Security Council and the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights --wherever they may take place-- should not be allowed to stand.

The Kosovo conflict has prompted a wide debate of profound importance to the resolution of conflicts. To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask in the context of Rwanda: If, in those dark days leading up to the genocide, a coalition of states had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside as the horror unfolded? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the security system created after World War II, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke them and in what circumstances?

In response to this turbulent era of crises and interventions some have suggested that the Charter itself -- with its roots in the aftermath of global inter-state war -- is ill-suited to guide us in a world of ethnic wars and intra-state violence. I believe they are wrong. Nothing in the Charter precludes a recognition that there are rights beyond borders.⁵⁹

The inability of a strictly legal paradigm for use of force to cope with such ambiguity is neatly encapsulated in the celebrated conclusion of the Independent International Commission on Kosovo that NATO's action there had been 'illegal but legitimate.'⁶⁰

In an attempt to answer the challenges posed by the apparent dilemma raised in Annan's address, the Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS), announcing this to the General Assembly in September 2000. The principal conclusion in the Commission's report⁶¹ was that inherent in state sovereignty is a responsibility to protect its own population and that when it fails in that responsibility either through deliberate act, negligence or incompetence, then there is a responsibility vested in the wider 'international community' to take action. This is summarized as two basic principles as shown in the following extract from the Commission report's synopsis:

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.⁶²

The Commission's proposals for executing the 'responsibility to protect' without that becoming an excuse for unbridled intervention is discussed further below. However, first it is necessary to consider, in slightly sharper focus, the failings of the existing mechanisms – principally UN peacekeeping.

3.3.3 The Failure of Existing Mechanisms

That mechanisms exist for use of force within the aegis of the UN Charter paradigm is not in question, but their effectiveness is. As Gareth Evans, one of the authors of the ICISS report, *The Duty to Protect*, argues:

No universally accepted practice currently governs the use of military force: states are going to war when they should not be, and not taking military action when they should. Available international law tools are not the problem: Chapter VII and Article 51 of the UN Charter, properly applied, between them enable the full range of necessary responses – both reactive and preventive – to all likely

future security threats. What is needed, in the Security Council and elsewhere, is better process to maximise the chances of reaching consensus as to when it is right to fight.⁶³

Then UN Secretary-General Kofi Annan, too, acknowledged the problem:

..... on the security side, despite a heightened sense of threat among many we lack even a basic consensus and implementation, where it occurs, is all too often contested.

Unless we can agree on a shared assessment of these threats and a common understanding of our obligations in addressing them, the United Nations will lag in providing security to all of its members and all the world's people. Our ability to assist those who seek freedom from fear will then be partial at best.⁶⁴

Consensus about when and how to use force has certainly dogged UN peace missions (or prevented them being launched at all) since the Charter's inception but it is not the only cause of the international system's inadequacy to protect. The difficulty of reaching consensus has led all too often to such mandates that have been agreed being too weak to allow the deployed forces to execute their missions effectively. Even when mandates have been, in the interpretation of some, strong enough, inadequate contribution to forces on the ground, undue concern for the safety of those forces relative to those they should protect, or the complications of multi-national command arrangements and national sensitivities, have rendered many vital UN operations almost entirely ineffective. Despite earnest vows that the world would allow 'no more Rwandas'⁶⁵, at the time of writing (April 2006) more than 7000 UN peacekeeping troops⁶⁶ were deployed in Sudan whilst press reports estimate that in the country's Darfur province there have been some 300,000 deaths and more than 2.2 million people displaced, in three years⁶⁷. The following short studies of UN operations in Cambodia (UNAMIC* Oct 91 – Mar 92; UNTAC† Feb 92 – Sep 93) and Bosnia (UNPROFOR‡ Feb 92- Mar 95), illustrate the point and highlight the principal failings of UN peacekeeping as a model for intervention.

The UN's involvement in Cambodia⁶⁸ was born out of the 1991 Paris Agreement (of which Gareth Evans was the leading architect). Conceived at the height of the euphoria

* United Nations Assistance Mission in Cambodia.

† United Nations Transitional Authority Cambodia.

‡ United Nations Protection Force.

and optimism that followed successful collective security action in the Gulf, it was to be the UN's most ambitious intervention to date, effectively placing Cambodia in a state of UN trusteeship. The Vietnamese invasion of Cambodia in 1978, though bred more of Vietnamese strategic interest than humanitarian concern had, nevertheless, rescued the country from what has been termed the 'auto-genocide' of Khmer Rouge rule⁶⁹. Although Vietnamese withdrawal had been brokered in 1989, civil war had continued until a cease-fire in May 1991 made possible agreement at Paris in October between the four principal protagonists: The People's Republic of Kampuchea (official government in Phnom Penh), the Khmer Rouge, Prince Sihanouk's Funcinpec, and the Kampuchea People's National Liberation Front. UNTAC was established by UNSCR 745⁷⁰ of 28 February 1992, and the mission began formally to deploy on March 15. It was to comprise 15,000 - 20,000 UN personnel.

In the eyes of many observers UNTAC was flawed from the outset because it involved agreement with the Khmer Rouge as an equal partner in the peace process instead of seeking to bring them to account for the atrocities committed during their period of rule from 1975-1978. The 'realpolitik' of affording such moral equivalence to those who have committed heinous crimes was to recur in Somalia, and in protracted negotiations with the Bosnian-Serb authorities, in particular, in Bosnia; it is an inevitable consequence of interventions based on consent from all parties. Although UNTAC may be regarded as a qualified success in that the planned elections were held before the mission was wound up in 1993, it left Cambodia still a dangerously unstable state.⁷¹ Moreover, the experience of UNTAC was to expose failings of the peacekeeping model that have since become all too familiar.

Whilst no insult is intended to the bravery and sacrifice of the 2247 UN peacekeepers* who have given their lives on the Organisation's missions since 1945⁷², it has become a recurrent theme that mission-success is endangered, if not rendered entirely impossible, by over concern about the safety of the peacekeepers. Mary Kaldor⁷³ has argued that in intervention operations the ethos must be that of the policeman – prepared to put

* All fatalities in UN peacekeeping mission service to 10 Apr 06, including accident and illness as well as enemy action. Figure includes military and civilian mission personnel and locally employed.

himself in the way of harm for the sake of those it is his duty to protect – and not the traditional ethos of the military which seeks to preserve its own safety, obviously over that of the enemy, but also when necessary over that of the ‘enemy non-combatant’. (The doctrine of double-effect, coupled with the just war tenets of proportionality and discrimination, supports the military view). Yet the UN Secretary General’s Special Representative in Cambodia, Yasushi Akashi, noted that ‘loss of life among volunteers from troop-contributing countries will have a chilling effect on their willingness to participate in peacekeeping operations and risks to them must be kept to a minimum.’⁷⁴

The scale of the UN’s planned deployment was ambitious and (for the Organisation) unprecedented but even so it was dogged by inadequate planning and preparation exacerbated by a failure of potential contributing nations to offer up sufficient forces for mission needs. (The inadequacies of the UN’s DPKO and of the current arrangements for troop contributions are considered in Section 2.2.3.1, above). Some troop contingents arrived with inadequate organic logistic support and the police and civil administration components arrived with none at all.⁷⁵

UNTAC eventually received all twelve battalions of peacekeeping troops that had been pledged but even after deployment there remained a difficulty with national vetoes over their employment. For example, the Force Commander, Australian General John Sanderson, planned to deploy the French battalion to the North East of the country close to the Vietnamese border. It remained a key sticking point for the Khmer Rouge’s cooperation with UNTAC and the wider peace process that there was still (Khmer Rouge claimed) significant numbers of Vietnamese in the country and incursion over the border was easy. The French battalion was well-equipped, tough and the most professional unit available to Sanderson. However, Paris insisted on their deployment to the safer, easier, and more visible area around Kompong Som, closer to the capital. Sanderson had instead to despatch the less-capable Uruguayan battalion to the North East.^{76*}

* Exactly the same issues of national caveat on internal redeployment of forces was to beset NATO’s operations in Afghanistan, 2006-2007. (Author’s personal experience).

The non-cooperation of the Khmer Rouge was a thorn in the side of the mission throughout its duration and also serves to highlight the difficulties faced by a mission that relies on consent and rigid impartiality. Shawcross⁷⁷ draws attention to one incident in particular that seriously dented the mission's credibility and left it looking impotent in the face of intransigence and hostility of one of the parties. Travelling together into Khmer Rouge held territory, Akashi and Sanderson were stopped at a check point. This was a clear and blatant breach of the treaty, the road block was only lightly manned and Sanderson could have used force to allow them passage. Concerned that confronting the Khmer Rouge would lead to open hostility for which the UN force was ill-equipped, Akashi and Sanderson turned back.

If at one level complete impartiality is a problem, then at another actual or perceived partiality on the part of one or more troop contingents can be equally damaging. In UNTAC's case it was the Indonesians who were cause for concern, perceived as being far too close to the Khmer Rouge⁷⁸.

UNTAC is an important case-study because it was so ambitious an undertaking but also because it was the first UN peacekeeping operation of the post-Cold War era. Many of the failings it exemplified were, sadly, portentous of what was to come.

Whilst establishing UNTAC the UN, and in particular its undermanned, over-stretched DPKO (see comments by Richard Holbrooke cited on p90), had also to contend with the unfolding crisis in the collapsing Yugoslavia. Brendan Simms, who has been particularly damning of the UK's policy towards the Balkan crises of the 1990s⁷⁹ identifies the fundamental mistake of the British Government as identifying the problem of Bosnia as 'primarily a humanitarian problem, rather than as a colossal politico-strategic challenge...'⁸⁰ This, however, was also the UN's mistake, as indicated by the fact that the appointed lead agency for the emerging crisis was not DPKO but the UN High Commissioner for Refugees (UNHCR). The policy seems to have been from the outset one not of intervention but of pointed non-intervention, backed by an attempt to secure the delivery of humanitarian aid and then to impose and monitor an arms embargo.

Shawcross suggests that, with the benefit of hindsight, the Serb assault and capture of the Croat town of Vukovar in November 1991 marked the last safe moment at which a timely direct military intervention (by NATO) could have prevented ‘Yugoslavia’s fall into the abyss.’⁸¹ What followed has been exhaustively reported and need not be described in detail here. We can, though, identify in the Balkans many of the same failings of UN peacekeeping as were evidenced by the operation in Cambodia. Unlike the Cambodian case, though, there was – at least not for a further four years* – no peace agreement at all. Moreover there was a serious lack of consensus between the would-be peacemakers. Whilst the US initially handed-off the problem to Europe (US Secretary of State James Baker famously insisting that ‘we don’t have a dog in that fight’⁸²) they also continued to appear to offer the prospect of alternative peace deals to the parties when not content with what the EU negotiators had offered (thus undermining both the Vance-Owen and Owen-Stoltenberg plans).

Not only was the UN over-stretched in its strategic planning capability, but on the ground a relentless ‘mission creep’ created insurmountable problems. The UN Protection Force (UNPROFOR) was established in 1992 to ensure the demilitarization of UN Protected Areas (UNPAs) in Croatia.⁸³ As such it had a traditional consent-based peacekeeping role. However, this rapidly expanded to include the protection of humanitarian aid delivery in both Croatia and Bosnia, peacekeeping in Bosnia, and an easily overlooked observer mission in Macedonia. It never had at its disposal the forces required to do this effectively. For example, when UNSCR 787 of November 1993 established observers to monitor compliance of the arms embargo and of sanctions on Serbia, the UN Secretary General asked for 10,000 troops for the mission. None were provided so the mandate was never implemented.⁸⁴ As French General Francis Briquemont, UNPROFOR’s commander, said there was a ‘fantastic gap between the resolutions of the Security Council, the will to execute these resolutions, and the means available to commanders in the field.’⁸⁵

* The General Framework Agreement for Peace in Bosnia and Herzegovina was signed by Croatia, Bosnia and Herzegovina and the Federal Republic of Yugoslavia in Paris in Dec 1995.

As with the operation in Cambodia, the UN's credibility was undermined in Bosnia by its inability to act without the agreement of an obdurate party to the conflict – in this case the Bosnian Serbs, in particular. Parallels with Akashi's and Sanderson's humiliation in Cambodia (see p190, above) can be drawn from the holding-up for many hours at a Bosnian Serb check point of UNPROFOR troops due to escort UN senior officials Marrack Goulding and Shashi Tharoor from Pale to Sarajevo.⁸⁶

The complex operation in Bosnia also reaffirmed an inevitable difficulty of multinational operations. Whilst a mission is strengthened politically by drawing its forces from as many nations as possible – and practically this is essential as no contributor is ever prepared to shoulder the entire burden – on the ground this can only complicate matters. UNTAC's experience hints at the difficulties, with the Indonesians' perceived closeness to one party, but UNPROFOR repeatedly confirmed the problem*. The principal problem is that troop contributing nations – for understandable national political reasons – never fully hand command of their troops to the UN. General Sir Michael Rose, UNPROFOR Commander in Bosnia and Herzegovina in 1994, describes the problem:

Every troop-contributing nation had its own national command structure within the main UN staff, and each nation has its own political agenda as well as a chief of contingent who held the national red card. This meant that if I gave an order and the chief of one of the nations considered it to be wrong, he could block it using his red card.⁸⁷

Rose continues to describe how these 'red cards' could be played not just over serious operational matters but over almost trivial matters of staff organisation, rendering the headquarters seriously inefficient.

In retrospect it is all too obvious that UN efforts in Bosnia were doomed to failure. A traditional peacekeeping mission had been deployed where the basic conditions of peacekeeping simply did not exist: there was no ceasefire; there was no peace agreement; there was no will to peace; and there was no clear consent from the warring parties. Nevertheless, the conditions for total disaster were set by the passage of

* Of course, this not a problem unique to the UN. Even a military alliance as experienced and well-organised as NATO suffers inefficiencies and other difficulties endemic to its multi-national make-up.

UNSCRs 824 (6 May 1993) and 836 (4 Jun 1993) establishing 'Safe Areas'. The full failings of the UN in Bosnia are exemplified nowhere better, or more tragically, than in the fall of the UN 'Safe Area' of Srebrenica. The UN's own *Srebrenica Report*⁸⁸, written by Secretary General Kofi Annan (who at the time of the tragedy had been Under Secretary-General for Peacekeeping Affairs), is a highly candid and self-critical examination of the events. It also stands as a damning indictment of the inadequacies of traditional (Chapter VI) peacekeeping.

The fall of Srebrenica began with a concerted Bosnian Serb Army (BSA) attack on Bosnian Government forces (ARBiH) on 6 July 1995. The ARBiH commander asked the local UNPROFOR commander for the return of heavy weapons surrendered under demilitarization agreements, but this request was turned down. At the same time apparently deliberate attacks by the BSA began on the Dutch UN troop (DUTCHBAT) positions in and around the town. As the attack developed over the following days, UN positions were over-run and UN personnel taken prisoner. Repeated requests by the DUTCHBAT commander for Close Air Support (CAS) were either turned down by UNPROFOR HQ in Sarajevo or went unactioned through confusion and staffing errors. Eventually, on 11 July, some limited CAS was provided in support of the beleaguered DUTCHBAT but it was too late to make a difference. Later that day the DUTCHBAT commander entered into negotiations with the BSA for a cease-fire. Following the fall of Srebrenica, between 12 and 20 July thousands of Bosniac men and boys were systematically murdered by the BSA. The details have been widely published elsewhere and need not be repeated here. It is the conclusion of the *Srebrenica Report* that is germane:

With the benefit of hindsight, one can see that many of the errors the United Nations made flowed from a single and no doubt well-intentioned effort: we tried to keep the peace and apply the rules of peacekeeping when there was no peace to keep. ... we tried to create – or imagine – an environment in which the tenets of peacekeeping – agreement between the parties, deployment by consent, and impartiality – could be upheld. We tried to stabilize the situation on the ground through cease-fire agreements, which brought us close to the Serbs, who controlled the larger proportion of the land. We tried to eschew the use of force except in self-defence, which brought us into conflict with the defenders of the safe areas, whose safety depended on our use of force.⁸⁹

... ..

The community of nations decided to respond to the war in Bosnia and Herzegovina with an arms embargo, with humanitarian aid and with the deployment of a peacekeeping force. It must be clearly stated that these measures were poor substitutes for more decisive and forceful action to prevent the unfolding horror.

The ‘cardinal lesson’ concludes Annan, ‘is that a deliberate and systematic attempt to terrorize, expel or murder an entire people must be met decisively with all necessary means, and with the political will to carry through the policy to its logical conclusion’⁹⁰ The final point is key, for in the latter stages of the Srebrenica debacle it was not that there was no mandate, nor that there was a lack of sufficient force available; rather it was an absence of political will to recognize that a change of approach was necessary and then to carry through explicitly articulated threats. Breakthrough in Bosnia was not achieved until the mindset on the UN had changed. Avoiding the mistakes so tragically evident at Srebrenica, Annan argued, would require that states recognize the need to address:

(s)uch issues as the gulf between mandate and means; the inadequacy of symbolic deterrence in the face of a systematic campaign of violence; the pervasive ambivalence within the United Nations regarding the role of force in the pursuit of peace; an institutional ideology of impartiality even when confronted with genocide; and a range of doctrinal and institutional issues that go to the heart of the United Nations’ ability to keep the peace and help protect civilian populations from armed conflict.⁹¹

If further examples of the failings in traditional peacekeeping were required, they could easily be drawn from the UN experience in Somalia (UNOSOM^{*} I, Apr 92-Mar 93, UNOSOM II, Mar 93-Mar 95), Rwanda (UNAMIR[†] Oct 93-Mar 96), or from Sudan where the tragedy is still playing out. Lest it be thought that what has been said above is an attack on the UN, specifically, it should also be noted that Somalia offers a dramatic example of what can go wrong in unilateral intervention operations, too. The US intervention in Somalia, Operation RESTORE HOPE, has been aptly described as ‘not a peacekeeping mission. It was rather one of armed humanitarianism.’⁹² It ended in disaster and tragedy.

^{*} United Nations Operation in Somalia.

[†] United Nations Assistance Mission in Rwanda.

3.3.4 The Dangers of Unfettered Interventionism and What Just War Might Offer

The argument of the last two sections is that there is a will, arguably an imperative, for intervention on grounds of humanitarian rescue or on grounds of preservation of vital interest (without necessarily meeting the obvious right of self defence against an immediate and direct military threat); and that such a will/imperative is not satisfied by the mechanisms made available by the legalist paradigm. Yet Chapter 2 has also shown that if the legal paradigm has failed, there remains a requirement for justification for resort to force (and of the conduct of wars); a free-for-all simply will not do. In arguing the case for intervention beyond the mechanisms supplied by the Charter of the UN (in the limited form in which they have been realized), there is a danger that we are arguing for unfettered interventionism. The risks are made plain by Michael Ignatieff:

The same executive power that authorized a Kosovo intervention today also authorized Vietnam and El Salvador yesterday. The day will surely come when the executive will seek to intervene somewhere in the name of human rights and do so in a fashion which violates or traduces the principles it purports to defend.⁹³

This, in a nutshell, is the very reason why many nations have been reluctant even to concede to UN authorization of intervention: for fear that every incidence of over-riding the doctrine of non-intervention makes it that much easier to do so in future; once the genie is released from the bottle it cannot be returned. As Nicholas Wheeler explains: ‘The worry here is that if individual states or groups of states are given the right to decide when humanitarian intervention is justified this will lead to the powerful imposing their values and interests on the weaker states.’⁹⁴

Whether intervention is undertaken by the UN, a coalition, or even unilaterally (with or without UN sanction), it is unlikely to be anything but a failure unless it has a clearly understood political aim, to which all else is subordinate, and the necessary means: in terms of manpower, equipment, resources, finance and mandate. All too often what has been seen is an inadequate and ill-conceived response to moral outcry: ‘something must be done.’ Colin Gray⁹⁵ warns that ‘(a)s a guide for moral behavior in foreign policy, plainly there is something rotten with outrage as the standard for offence against

humane values. The problem, of course, is that the scale of moral affront inherently is utterly disconnected from probability of strategic effectiveness.’ (See also p13).

What Gray is reminding us is that Clausewitz is as applicable in interventions as in traditional inter-state war: armed force must be subservient to political ends. If the ends are not well-considered, or if the deployed means are inadequate or poorly matched to achieving them, then failure is inevitable. In Somalia, already confused by parallel, sometimes overlapping, sometimes competing, UN and US operations, ‘mission objectives were unrealistic and unachievable’ says Paul Harris.⁹⁶ He quotes UN official Elisabeth Lindenmayer describing the UN’s mission as ‘to put Humpty Dumpty together again. In addition to protecting the delivery of humanitarian assistance, it was asked to disarm the factions, assist in the establishment of a police force and a judicial system, repatriate refugees and lead the country to national reconciliation.’⁹⁷ Such an admixture of roles is almost certainly incompatible, creates moral and legal confusion for the soldiers who must try to put them into effect and inevitably results in rules of engagement and a military stance that suits none of the roles ideally. Similar confusion has existed in Bosnia, in Kosovo and today in Iraq. Furthermore, Mark Turner, writing on Somalia for *The Financial Times*, warns that our political goals, even when they are fully articulated, can be highly misjudged; the Western view of liberal democracy and its essential institutions, evolved over centuries, may not fit easily when imposed forcibly on countries with a very different experience: ‘Somalia has become a living testament to the futility of political solutions driven by outsiders, where Western style state institutions have little meaning and attempts by foreigners to introduce societal change have faced constant failure.’⁹⁸

So we have seen, in the West at least, a fundamental shift of ethic-set in the last decade or two from one privileging order towards one focused on the right of the individual over the right of the state; one that privileges individual justice over order and the sovereignty of states. There has followed a signal change in the will to intervene. Yet there are plenty of warnings on the dangers of unbridled intervention; the UN Charter paradigm is too restrictive but we cannot countenance a free-for-all. What then should guide the restrictions on states’ right, or indeed duty, to intervene?

This discussion of humanitarian intervention was opened with Walzer's statement of the legalist paradigm (see p180) so it is to Walzer we turn first for guidance on how exceptions to the paradigm should be controlled. We have seen that Walzer's characterization of the legalist paradigm, which is reflected in the international legal system by the UN Charter, privileges territorial integrity and political sovereignty of states above all else. Thus non-intervention is the rule; however, exceptions are to be allowed. Walzer's argument is that non-intervention follows, if not immediately obviously and unambiguously, from the very 'conceptions of life and liberty that underlie the (legalist) paradigm and make it plausible. But these same conceptions seem also to require that we sometimes disregard the principle; and what might be called the rules of disregard, rather than the principle itself, have been the focus of moral interest and argument.'⁹⁹ First amongst the 'rules of disregard' is the overarching principle that any intervention must be justified; the burden of proof is with those who would intervene:

The burden of proof falls on any political leader who tries to shape the domestic arrangements or alter the conditions of life in a foreign country. And when the attempt is made with armed force, the burden is especially heavy – not only because of the coercions and ravages that military intervention inevitably brings, but also because it is thought that the citizens of a sovereign state have a right, insofar as they are to be coerced and ravaged at all, to suffer only at one another's hands.¹⁰⁰

Now, the final point may seem somewhat strange and contentious – and we shall see later another related point of Walzer's with regard to counter-intervention that is equally non-intuitive. However, there are two key points of absolutely vital importance to be drawn out here: if the general principle of non-intervention, based as it is on morally and legally sound conceptions, is to be preserved, then any exceptions to it have to be fully justified; and we must never forget that any armed intervention, however well-intentioned and morally justifiable, risks, with a very high likelihood, death and damage in some measure to the very people on whose behalf it has been launched. This much, at least, we must take forward from Walzer.

Drawing heavily on interpretations of the arguments of John Stuart Mill, Walzer, outlines three cases which justify, *prima facie*, intervention¹⁰¹: in a civil war to support

the secessionist aims of a sustainable minority political community; to counter the intervention of another state in the affairs of a third; or – that with which in recent years we have become far more familiar – to counter extreme violations of human rights in a conflict or by a government oppressing its own people. In examining historical illustrations of the first of these two, Walzer's arguments appear to be come somewhat interspersed such that the categories in fact become difficult to separate. The 1849 Hungarian uprising is given as an example of a secessionist movement on whose behalf it would have been right to intervene, but the justification seems to rest rather on the Austrian annexation of Hungary, i.e. making a counter-interventionist argument. Moreover, in both cases Walzer seems to move us onto dangerously subjective grounds. He argues a case for intervention on the side of the Hungarians, but against US support for South Vietnamese secessionism. Similarly, supporting NATO's 1999 attacks on Serbia as a justified support for Albanian secessionism might lead us, logically, to offer the same justification to Serbia/The Federal Republic of Yugoslavia intervening on behalf of the Republika Srpska's desired secession from Bosnia. Walzer's limiting of support to secessions to those by communities capable of independent existence is sensible – invoking the just war tenet of reasonable chance of success – but adds little moral clarity.

Doubts must also be raised here over Walzer's (apparently Millian) argument that counter-intervention in a civil war should be limited to re-levelling the playing field, i.e. providing only a counter-balance to an intervention in support of the other side.¹⁰² Such a limitation would be all but impossible to effect. Armed intervention is not a game; if our forces do intervene on behalf of one side in a conflict then for their own safety, if nothing else, they must be mandated – and resourced – to win.

When it comes to intervention to protect human rights, Walzer is far more straight forward:

If the dominant forces within a state are engaged in massive violations of human rights, the appeal to self-determination in the Millian sense of self-help is not very attractive. That appeal has to do with the freedom of the community taken as a whole; it has no force when what is at stake is the bare survival or the minimal liberty of (some substantial number of) its members. Against the enslavement or massacre of political opponents, national minorities, and

religious sects, there may well be no help unless it comes from outside. And when a government turns savagely on its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply.¹⁰³

Nevertheless, Walzer continues with a warning that ‘clear examples of what is called “humanitarian intervention” are very rare. Indeed, I have not found any, but only mixed cases where the humanitarian motive is one among several. States don’t send their soldiers into other states, it seems, only in order to save lives.’¹⁰⁴ States’ motives may be hard fully to unveil but it seems reasonable to argue that there have now been such cases – the UK’s intervention in Sierra Leone in 2000 springs to mind. Nevertheless, Walzer’s cynicism is historically justified. It is for this very reason that just war requires right intent in addition to just cause. Walzer invokes just war, too, in considering the importance of the practicability of an intervention:

A state contemplating intervention or counter-intervention will for prudential reasons weigh the dangers to itself, but it must also, *and for moral reasons*, weigh the dangers its actions will impose on the people it is designed to benefit and on all other people who may be affected. An intervention is not just if it subjects third parties to terrible risks; the subjection cancels the justice.^{105*} (Original emphasis).

Walzer, as one who has had a leading place in articulation of the legalist paradigm must be viewed as generally non-interventionist. Where he does allow of exceptions to the rule Walzer’s argument on interventions, James Turner Johnson¹⁰⁶ suggests, can be boiled down to issues of justice of cause and reasonable chance of success (or the presence of a third party). Though, as we have seen, he also touches on right intent. In other words, we are beginning to see the tenets of just war applied as the restriction on intervention, in the same way that they were devised to constrain war.

George Lucas criticizes Walzer for being overly restrictive on intervention (and pre-emption, which we shall examine in the next section) and, indeed, for being selective in how he draws on Mill. In particular, Lucas draws attention to the following passage of Mill’s, ignored by Walzer:

(T)here assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack: and it is very important that

* How issues of *jus in bello* might affect the justice of an intervention is considered in the next chapter.

nations should make up their minds in time, as to what these cases are. with a view to establish some rule or criterion whereby the justifiableness of intervening in the internal affairs of other countries, and (what is sometimes fully as questionable) the justifiableness of refraining from intervention¹⁰⁷

In other words Mill is hinting that, as picked up in the work of Gareth Evans *et al* (see p186), there may be occasions when intervention is not only permissible but obligatory. Lucas argues that Walzer's narrow interpretation of Mill, and the legal paradigm as a whole, much as has been argued above, has proved wanting. Explicitly recognizing the just war foundation of his thesis, he sets out an alternative set of principles for *jus ad pacem* or *jus ad interventionem*, drawing on work by Stanley Hoffman, Brian Hehir, Paul Christopher and James Turner Johnson. Lucas's initial draft proposals are shown at Table 3-1.

1.	Humanitarian Intervention is justified whenever a nation-state's behaviour results in grave and massive violations of human rights.
2.	(A) Sovereignty may be overridden whenever the protection of the rights of that state's own citizens can be assured only from the outside. (B) The decision to override sovereignty and intervene must be made by an appropriate collective international body.
3.	The intention in using force must be restricted without exception to purely humanitarian concerns, such as the restoration of law and order in the face of natural disaster, or to the protection of the rights and liberties of vulnerable peoples (as defined in the United Nations Charter and the Universal Declaration of Human Rights).
4.	Military Intervention may be resorted to for humanitarian purposes only when all other options have been exhausted.
5.	Military force may be utilized for humanitarian purposes only when there is a reasonable likelihood that the application of force will meet with success in averting humanitarian tragedy.
6.	The lives, welfare, rights and liberties to be protected must bear some reasonable proportion to the risks of harm incurred, and the damage one might reasonably expect to inflict in pursuit of humanitarian ends.
7.	Humanitarian intervention can never be pursued via military means that themselves are deemed illegal or immoral.

Table 3-1 Draft Proposals by George Lucas (and others) for Principles of *Jus ad Interventionem*¹⁰⁸

The Catholic Bishops of the US are even more explicit in drawing on traditional just war doctrine for justification of intervention. This from *The Harvest of Justice is Sown in Peace*:

First, whether lethal force may be used is governed by the following criteria:

Just Cause: force may be used only to correct a grave, public evil, i.e. aggression or massive violation of the basic rights of whole populations;
Legitimate Authority: only duly constituted public authorities may use deadly force or wage war;
Right Intention: force may be used only in a truly just cause and solely for that purpose;
Probability of Success: arms may not be used in a futile cause or in a case where disproportionate measures are required to achieve success;
Proportionality: the overall destruction expected from the use of force must be outweighed by the good to be achieved;
Last Resort: force may be used only after all peaceful alternatives have been seriously tried and exhausted.

These criteria (*jus ad bellum*), taken as a whole, must be satisfied in order to override the strong presumption against the use of force.¹⁰⁹ (Original emphasis).

For Paul Ramsey, too, the use of military force in the pursuit of justice is among the ‘rights and duties of states unless and until supplanted by superior government’¹¹⁰ This echoes Aquinas’ argument that war between states could be justified in a way that war between private citizens could not because states had no higher authority to turn to for adjudication and application of law (see p50). It also anticipates the ICISS report (see p186) in seeing intervention, in certain circumstances, as not only permissible but obligatory. Ramsey identifies four conditions that determine the circumstances in which intervention should be considered: the political justice to be gained; order, which is itself an end to be served; the degree to which international and national good are to be served, recognizing that these two may be competing, but seeking circumstances in which there is the greatest overlap; and the requirements of both national and international law.¹¹¹ He is explicit in arguing that there are circumstances in which the interests of justice require that the law be overridden:

Not all justice is legal justice. Not all order is legal order. The legalities comprise, of course, mankind’s attempt to impose some coherence upon the order of power. But such coherence flows from the justice that may be preserved, beyond or beneath the legalities, in the relative power positions of the nations.¹¹²

Recognising the greater imperfections of international law compared with domestic law (itself imperfect), and especially the even greater lack of processes for change, Ramsey is clearly of the view that arguments of justice can override those of law; nevertheless, upholding the law is a good thing and the erosion of its standing is something to be

taken into account when calculating the overall good to be achieved. Ramsey, then, would undoubtedly follow the logic (whether or not he agreed in the specific incident) of the International Kosovo Commission's 'illegal but legitimate.' (See p101) Right intent, rather than simply just cause, seems to be the key.

An important facet of Ramsey's argument is the recognition that no state or group of states can do all that rightly should be done. The obligation to intervene has to be balanced by the realization that we cannot do everything; the resources reasonably available to states, especially the most powerful (and therefore most obligated), have to form part of the calculus.

Tony Blair's seminal 'Chicago Speech' (see p101) also made this point: 'Looking around the world there are many regimes that are undemocratic and engaged in barbarous acts. If we wanted to right every wrong that we see in the modern world then we would do little else than intervene in the affairs of other countries. We would not be able to cope.'¹¹³ The speech acknowledged the importance of the principle of non-intervention:

Non-interference has long been considered an important principle of international order. And it is not one we would want to jettison too readily. One state should not feel it has the right to change the political system of another or foment subversion or seize pieces of territory to which it feels it should have some claim.

Nevertheless, it took the same track that was examined above (see Section 3.3.2): '..... the principle of non-interference must be qualified in important respects. Acts of genocide can never be a purely internal matter. When oppression produces massive flows of refugees which unsettle neighbouring countries then they can properly be described as "threats to international peace and security"'.¹¹⁴ Blair then went on to outline five broad criteria to be met as the conditions for intervention. They have a distinctly just war tone to them:

First, are we sure of our case? War is an imperfect instrument for righting humanitarian distress; but armed force is sometimes the only means of dealing with dictators. Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo. Third, on the basis of a practical assessment of the situation, are there military operations we

can sensibly and prudently undertake? Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers. And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe.

The first condition could be interpreted as a mixture of ‘just cause’ and ‘proportionality’; the second is clearly ‘last resort’; the third ‘reasonable chance of success’; the fourth ‘right intent’. Only the fifth condition, still an eminently sensible one, and reflecting the earlier point about resources, is not in some way obviously drawn from the just war tradition.

More recently still the attempt by Gareth Evans and the ICISS to codify the circumstances under which humanitarian concern must override sovereignty also quite clearly draws on just war tradition:

It is perhaps not as difficult as it appears at first sight to identify criteria for military intervention for human protection purposes about which people should be able to agree. It is true that there are presently almost as many different lists of such criteria as there are contributions to the literature and political debate on this subject. But the differing length of these lists, and the different terminology involved, should not obscure the reality that there is an enormous amount of common ground to be found when one focuses on the core issues.

While there is no universally accepted single list, in the Commission’s judgment all the relevant decision making criteria can be succinctly summarized under the following six headings: *right authority, just cause, right intention, last resort, proportional means* and *reasonable prospects*.¹¹⁵ (Original emphasis).

The Commission spends considerable time discussing right authority and just cause whilst the other four are taken with rather less discussion as reasonably uncontentious.

Other criteria for intervention have been advanced. In particular, it is worth considering two alternative US formulations: the Weinberger-Powell doctrine, initially articulated by US Secretary of Defense Caspar Weinberger in 1984 and subsequently developed by Chairman of the Joint Chiefs of Staff, Colin Powell; and President Clinton’s Presidential Decision Document (PDD) 25, produced in the wake of the Somalia

debacle.

Weinberger-Powell is, essentially, about warfighting proper but could be applied to interventions. It has become, though possibly through unfair simplification, associated with ideas of casualty aversion and excessive force-protection. (It will be further examined in Chapter 4 when we consider how these ideas can impact on *jus in bello*). First explicitly presented by Weinberger in an address at the National Press Club entitled ‘The Uses of Military Force’¹¹⁶ in 1984, the doctrine can be summarised as follows:

- Military force should only be used when specific national interests are at stake.
- There must be a whole-hearted commitment to achieving military victory, with the necessary resources available.
- Political and military objectives can be clearly identified.
- There must be an identifiable end-state and exit strategy.
- Overwhelming military force must be brought to bear on the enemy.
- The support of Congress and the US people should be ‘reasonably assured’.

By contrast, PDD 25¹¹⁷ was specifically focussed on determining the occasions on which the US would support UN peace support operations (either under Chapter VI or Chapter VII of the Charter). The factors to be considered were:

- UN involvement would advance US interests.
- There is international support for dealing with the problem multilaterally.
- There exists a threat to or breach of international security, defined as;
 - International aggression, or
 - An urgent humanitarian disaster coupled with violence;
 - The sudden interruption of established democracy, gross violation of human rights coupled with violence, or threat of violence.
- Objectives are clearly defined.
- For Chapter VI operations there is an established ceasefire and all-party consent.
- For Chapter VII operations the threat to peace and security is ‘significant’.
- Sufficient means are available to accomplish the mission, including the forces, financing and an appropriate mandate.
- The consequences of inaction are unacceptable.
- The operation’s anticipated duration is tied to clear objectives and realistic criteria for ending the operation.

What has been shown, however, is that there is a considerable weight of opinion behind the application of (modified) just war criteria to provide a framework of justification for

intervention. Even the more national-interest criteria-formulations of Weinberger-Powell and PDD 25 contain identifiably just war elements (especially reasonable chance of success), though rather more heavily laced with the strategic caution we have noted from Gray (see p13 and p196). What is necessary now is to consider the potential difficulties that use of a just war framework might involve. Like the ICISS we should perhaps devote greatest attention to Just Cause and Proper Authority, though Right Intent will also be considered. In the next chapter, when considering issues of *jus in bello*, due consideration will be given to issues of conduct of humanitarian interventions, particularly with regard to the impact of technology on proportionality.

3.3.4.1 Just Cause in Humanitarian Intervention

The problem with humanitarianism as an all-embracing just cause is that it is neither well defined nor as universally understood as many liberal-interventionists would insist. (See, for example E H Carr's realist critique of liberal moral universalism, discussed at p11). Rob de Wijk notes:

In Asia, for the most part, authoritarian state and family structures dominate and democracy and individual rights are secondary. Islamic countries mostly reject the Western separation of church and state. China not only continued to criticize the Western conception of democracy, but also questioned the universality of the declaration of Human Rights. Consistent with the Confucian civilization, the rulers in Beijing maintained that individual human rights are subordinated to collective state rights. This means that in China democracy will have a different meaning than in the West. China's criticism made clear that so-called universal values were not considered universal by everyone.¹¹⁸

De Wijk goes on to point out the inconsistencies that arise from the West's mixing of ideology and strategic interest in its foreign policies; inconsistencies that both confuse and anger non-Western states:

Western governments declared genocide in Bosnia sufficient grounds for intervention, but largely ignored genocide in Rwanda, Burundi, and Sudan; non-proliferation is considered important for Iran, Iraq, Pakistan and India, but not for Israel; Saddam Hussein's annexation of Kuwait was not tolerated, but Turkish partition of Cyprus, the Indian takeover of Goa and the Indonesian seizure of East Timor were; China's human rights policies were criticized, but human rights abuses by allies in the Gulf region, such as Egypt and Saudi Arabia, were tolerated.¹¹⁹

‘Democracy’ says de Wijk ‘is promoted, but not if it gives power to non-Christian religious fundamentalists.’¹²⁰ We might note as an addition to this the EU’s decision in 2000 to impose sanctions on Austria because of the formation of a coalition government including the far-right Freedom Party that had taken second place in a democratic election; or the insistence of the West in democratic elections in Palestine (2006) but subsequent refusal to deal with the Palestinian Authority when the extremist Hamas organisation were overwhelmingly victorious. There had been similar discontent in the West when free elections it had insisted upon and facilitated in Former Yugoslavia, produced results favourable to nationalist and separatist elements. So the West’s own standards for human rights and democracy can be relative, especially when viewed from outside.

In the context of contemporary conflicts it is worth considering a fundamentally different conceptualisation of human rights that exists between Western liberal democracies, on the one hand, and the Islamic conception predominant in the Middle East. Whilst Western liberal democracy increasingly places the individual at the epicentre of the rights-system, the central tenet of Islam is of God’s sovereignty. There can be no recognition of any other authority, thus all legal and political systems must be based on Shari’a – the law flowing from the Qur’an, the Hadith and their interpretation and commentary by early Muslim scholars. Whilst some Muslims argue for change and reinterpretation of Shari’a, fundamentalists argue it is unchangeable. Given that it was largely fixed by the end of the 10th century there are inevitable clashes with modern Western understanding of human rights.¹²¹ Under the Islamic conception individuals’ happiness is obtained through obedience to the law of God, as interpreted through the rules of society; thus the individual is subordinate and the rights of one may be subordinated to the good of the whole. The alternative conceptions of rights can be summarised as in Figure 3-1

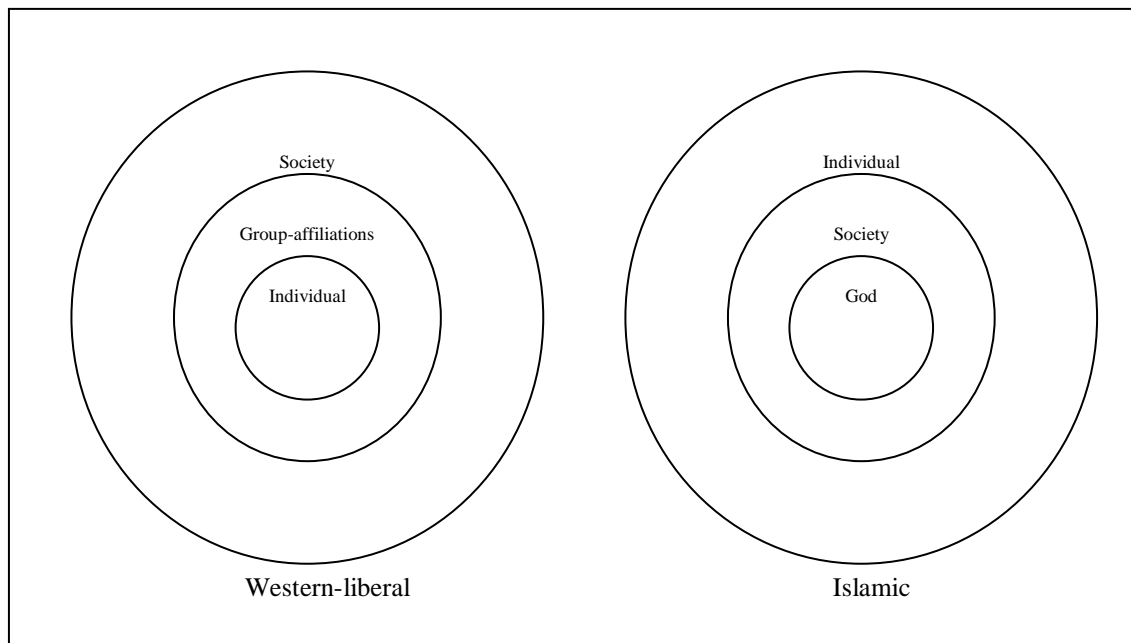


Figure 3-1 Competing Conceptualizations of the Place of the Individual in Rights-Systems.¹²²

If the universality of human rights cannot be taken for granted, still less can be universal acceptance of human rights violations as justification for armed intervention. Unsurprisingly, then, non-Western states are both sceptical and wary of Western attempts to frame a doctrine of intervention based on Western democratic principles and conceptualisation of human rights.

We must also consider the extent of human rights breaches that might be necessary in order to justify armed intervention. When Stanley Hoffman¹²³ refers to the ‘mischief’ that nations may do within their borders that might justify intervention, he surely means ‘mischief’ only of the gravest kind. Just war can, of course, offer the guidance here of proportionality. Armed intervention in the affairs of another state is, in essence, a bad thing. However, it can be justified when it is necessary in order to stop a worse thing. Genocide is clearly bad enough to justify intervention; a punitive tax regime, however undesirable, is not. The issue then is how ‘mischievous’ (in Hoffman’s terms) a government must be in order to justify its being the target of intervention. The ICISS recognised this explicitly. Firstly it argues that military intervention must be limited to ‘extreme and exceptional cases’¹²⁴. Furthermore, it took the view that

(m)ost internal political or civil disagreements, even conflicts, within states do not require coercive intervention by external powers. The non-interference rule not only protects states and governments: it also protects peoples and cultures, enabling societies to maintain the religious, ethnic, and civilizational differences that they cherish.¹²⁵

Nevertheless, it accepted that

there are exceptional circumstances in which the very interest that all states have in maintaining a stable international order requires them to react when all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale.¹²⁶

The exceptional circumstances that should justify military intervention were taken, from the Commission's consultations, to be those 'cases of violence which so genuinely "shock the conscience of mankind," or which present such a clear and present danger to international security'¹²⁷ and these were further narrowed to those circumstances in which military action was necessary to

halt or avert:

- *large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or*
- *large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.*¹²⁸ (Original emphasis)

For the ICISS, these are the conditions required to meet the Just Cause criteria. These deliberately restrictive conditions reflect earlier discussion of the issue, too. Writing as early as 1993, Richard B Lillich¹²⁹ offers a similar formulation:

UN humanitarian intervention must be based on the actual existence or impending likelihood of gross or persistent human rights violations that *shock the world's conscience*. (Such violations occur, *inter alia*, from systematic and indiscriminate attacks on civilians by a central government, or a system breakdown in law and order producing the dislocation and starvation of the civilian population.) (Emphasis added).

An alternative conception for Just Cause is offered by Ian Holliday.¹³⁰ Holliday argues, firstly, that in the context of the post-Westphalian privileging of state sovereignty, 'just cause' in traditional conceptualisations of just war doctrine has become roughly synonymous with 'self defence'. That this is inadequate for current circumstances is clear from the discussion above (see Section 3.3.2) about the growing imperative for intervention. Secondly, Holliday suggests, at least in common usage there is a strong

tendency to equate *jus ad bellum* with Just Cause, of which the other *jus ad bellum* tenets are then simply constituent parts or conditional clauses; we need a reconceptualization of the doctrine that explicitly recognises this:

(W)e tend to think the conditions customarily placed alongside just cause in a standard *ad bellum* list are actually components of it. A belligerent that engaged in war against evil without exhausting the available options could not be said to have a just cause. Another belligerent would not have just cause if it did not meet the legitimate authority condition. Similarly there is no just cause in taking excessive measures even to right an acknowledged wrong. The justice of a given cause is, then, compromised and even undermined if conditions such as right intention, legitimate authority and so on are not met. In short, a just cause judgement can only be made at the end of this particular line, not at the beginning.¹³¹

Such a reconceptualization then requires a new condition to occupy the place of the ‘promoted’ just cause. Traditional notions of ‘self defence’ or ‘wrong received’ might seem obvious, would have many supporters, and are to be found throughout the just war canon. However, as all our earlier discussion on the will to intervene would suggest, this is insufficient. Holliday draws in part on those same passages of Mill that we have seen George Lucas turn to in his criticism of Walzer (see p199) (for example ‘War is an ugly thing but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing worth a war is worse’¹³²). He then proposes that the presumption against war, which stands at the very start of just war doctrine, should be replaced with a presumption in favour of justice. The place of just cause in the conditions of *jus ad bellum* may then be taken by ‘the existence of a demonstrable injustice.’ Just cause may then be given a three part structure as shown in Figure 3-2.

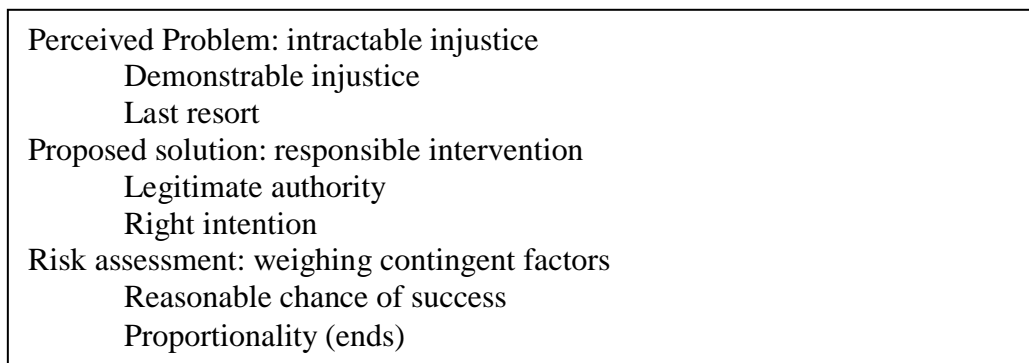


Figure 3-2 Holliday's Restructuring of *Jus ad Bellum*¹³³

Of course, this conceptualization of just cause, opens wide debate as to the nature of justice, as Holliday himself recognises: ‘Given the enormous amount of Western debate prompted by Rawls’ publication of *A Theory of Justice* in 1971, and the jihad versus McWorld ideological contests that have developed across the globe more recently, it is only to be expected that a wide range of perspectives will be confronted at this point.’¹³⁴

We need not be too alarmed that Holliday’s formulation would open the way for too many interventions because the other conditions – last resort and proportionality, in particular – provide the stay. Nevertheless, we might choose to further constrain the just cause by incorporating into Holliday the restriction discussed earlier to cases of injustice that ‘shock the conscience of mankind’. We are then presented with a formulation of just cause for humanitarian intervention thus: There exists an intractable injustice so grievous as to shock the conscience of mankind and this can only be halted by the use of military force; the proposed intervention has the authority of a legitimate body and the intentions of the intervening powers are (demonstrably) right; there is a reasonable chance of success and the use of military action (and its intended scale) is proportionate to the injustice to be addressed. Before we can accept this, we must give further consideration to the right intent, reasonable chance of success and legitimate authority conditions.

Before leaving this discussion of just cause, it is worth noting that in the contemporary security environment, in which security clearly involves much more than territorial defence, there may well be self defence justifications for intervention. The issue of whether such interventions can be pre-emptive/preventive is discussed below and the possible need for interventionist action in combating terrorism and wider asymmetric warfare will be discussed in the next chapter.

3.3.4.2 Right Intent and Reasonable Chance of Success in Humanitarian Intervention

Holliday’s reformulation of just cause goes some way to removing the subjectivity of the judgement that has always been a difficulty for discussion of *jus ad bellum* – by

placing just cause at the top of the argument with a set of conditions that are to be met. The subjectivity is not entirely removed; rather it is transferred to debates about justice and what constitutes an 'intractable injustice'. Similarly there may remain argument about what scale of atrocity is needed to genuinely 'shock the conscience of mankind'. Vattel was only too well aware of this, insisting on the need for a system of 'voluntary law' – objectively verifiable – to avoid the otherwise inevitable situation of any protagonist in a conflict declaring just cause and right on their side (see p56). Today we see both the United States and her allies, on the one hand, and the terrorist organisations who have attacked her, on the other, claim just cause. Were either side to adopt Holliday's formulation, then they would similarly lay claim to an 'intractable injustice'.

To take but one example of the difficulty in objectively determining just cause, we could consider the 2003 Iraq War. Although justified before the event on more traditional self-defence and national interest lines, there was a gradual *post hoc* shift in the US (and even more pronouncedly in the UK), to humanitarian justification.

As the months have passed and U.S. weapons inspectors have failed to report significant finds, the administration has gradually shifted from dire-sounding warnings about alleged Iraqi weapons toward a greater emphasis on other justifications for the war in Iraq.

One is that the war was intended to bring democracy to Iraq, and eventually perhaps to its neighbors; the other is that it toppled a brutal dictator responsible for perhaps hundreds of thousands of deaths.¹³⁵

This shift was reflected in President Bush's 2004 State of the Union address which referred to US armed forces 'bringing hope to the oppressed, and delivering justice to the violent ...'.¹³⁶ He continued:

Had we failed to act Iraq's torture chambers would still be filled with victims, terrified and innocent. The killing fields of Iraq -- where hundreds of thousands of men and women and children vanished into the sands -- would still be known only to the killers. For all who love freedom and peace, the world without Saddam Hussein's regime is a better and safer place.

Yet, at the same time, leading humanitarian activist group Human Rights Watch (HRW) denied the humanitarian imperative of the Iraq invasion. Arguing that use of force might have been justified by the Iraqi regime's atrocities against the Kurds in 1988,

HRW concluded that ‘the killing in Iraq at the time (of the 2003 invasion) was not of the exceptional nature that would justify such intervention.’¹³⁷

Right intent is perhaps a more objectively verifiable condition; there should be evidence to support a state’s (or non-state actor’s) claim that its intentions in resorting to force were righteous. This condition also helps us over another hurdle identified by Walzer – few if any ‘humanitarian’ interventions are ever solely humanitarian (see p199); motives are invariably mixed. If the justness of the cause is subjective and the motive mixed, at least we can demand evidence that the intent was good.

Alex Bellamy, in examining broader approaches to the intervention debate than those contained within the English School, suggests that the discussion can usefully be enhanced by considering intervention

not as a discrete act but as part of a wider web of transnational relations. Humanitarian claims made by interveners should not therefore be treated in isolation or evaluated solely in relation to abstract notions of international law. Instead, they should be assessed alongside the intervener’s role in constructing the structural environment that caused the humanitarian emergency and the resources it committed to preventing the catastrophe and rebuilding afterwards.¹³⁸

A just war approach, however, would also allow consideration of this, as a key component of right intent.

The importance of such right intent in intervention (whether purely humanitarian or not) was stressed by the UK Foreign Secretary, Jack Straw, when addressing the issue of long term commitment to Afghanistan after the US-UK intervention to remove the Taliban regime in 2002.*

Long before the terrorists hijacked the airliners that flew into the World Trade Centre and the Pentagon, they hijacked Afghanistan. Its people have been the biggest victims of the nexus formed by al-Qaida and the Taliban regime, through the denial of human rights, the complete absence of any strategy for economic development, and the obstruction of humanitarian aid.

The military defeat of the Taliban regime was therefore the liberation of the Afghan people. But there is now the imperative on the international community

* Clearly this was an intervention justified primarily on self-defence and vital national interest issues rather than humanitarian but a humanitarian element is still present in the rhetoric of justification.

of a second liberation: liberating the Afghan people from the other scourges which have beset them for decades: fear, hunger, poverty and war.¹³⁹

In other words a simple military intervention was not enough; for the intervention to be justified the intention had to be right, too: a long term commitment to improving the lot of ordinary Afghans. Most importantly, Straw emphasized the requirement that the coalition that had intervened in Afghanistan be prepared to commit the necessary resources, including, crucially, political will.¹⁴⁰ It is for this reason that ‘right intent’ and ‘reasonable chance of success’ have been grouped together for discussion in this section: right intent is undermined if the resources are not available, or not committed, that will ensure reasonable chance of success.

Yet, despite the rapid success in removing the Taliban regime and establishing a relatively stable government in Kabul, insufficient effort and resources were committed to rebuilding the remainder of the country. With the US and her close allies diverted by their much larger-scale intervention in Iraq, Afghanistan became what Anthony Cordesman has called the ‘not quite forgotten’ war:

Nation building is having its own crisis in Afghanistan ... ‘Victory’ ... has proved as relative as in Iraq. The Taliban has mutated and is fighting again, Al Qa’ida has lost many of its leaders but as mutated and relocated some of its operations in Pakistan, the internal tensions in Afghanistan threaten to make its central government the government of ‘Kabulistan’, and the spillover of Islamic extremism into Central and South Asia continues.¹⁴¹

Critics of the US-led invasion of Iraq in 2003 have frequently pointed to the apparent failure to plan for the post-conflict situation, as undermining the coalition’s moral case. Colonel Tim Collins, who commanded a British infantry battalion during the invasion has argued explicitly that this failure undermined the legitimacy of the *causus belli* as understood by most soldiers on the ground: the liberation of the Iraqi people from a tyrannical regime.¹⁴² Whilst less prepared to make such statements publicly, several senior officers closely involved with the planning and execution of the war have made the same point privately to the author: they felt that the evidence they saw of the regime’s oppression of the Iraqi people justified the invasion, but that the complete failure of any significant plan for post-conflict seriously dented the morality of the action.¹⁴³ For just one example of a failure to plan, consider the state of the Iraqi health

service; already in a dire state as a result of years of external sanctions and mismanagement by the regime, this once first world standard health service was decimated by the mis-judged policy of de-ba'athification; there was no plan in place to provide even the basics of a civilian health service as the US and UK forces became the occupying power.¹⁴⁴ Richard Holmes makes the following point:

It is possible that had the coalition been ready to exploit the brief honeymoon period that followed its victory with the rapid rebuilding of the battered infrastructure and the nourishment of soft security, then the slide towards disorder might have been checked early on. But by the time the coalition bent its nerve towards these objectives the metronome had ticked on, and events on the ground were moving faster than the coalition's policy makers reckoned.¹⁴⁵

Yet even in 2004, a year after the end of 'major combat operations', there was little evidence to troops on the ground of any significant effort to address wider stability and reconstruction efforts:

In Maysan province there was not a single official of the British Foreign and Commonwealth Office to provide political, cultural or any other form of advice. The commanding officer, an infantryman with a degree in agricultural economics, was left to get on with it. There were two policy advisers (POLADs) who served with the battle group during its time in Al Amarah. Neither had a diplomatic background, spoke any Arabic, or had worked in or on the region; one came from a weapons procurement background.

Equally there was little real help with reconstruction and aid projects. The Department for International Development (DfID) was not represented.¹⁴⁶

Central to Kenneth Roth's¹⁴⁷ argument, referred to above (see p211), about the invasion of Iraq is that the failure to take account of the Iraqi people's perspective undermines claims to humanitarianism. The ICISS approach also seeks to refocus the debate away from the intervener and his claimed cause and onto the alleged victims and intentions toward them¹⁴⁸:

The Commission is of the view that the debate about intervention for human protection purposes should focus not on "the right to intervene" but on "the responsibility to protect." The proposed change in terminology is also *a change in perspective, reversing the perceptions inherent in the traditional language*, and adding some additional ones:

- First, the responsibility to protect implies an evaluation of the *issues from the point of view of those seeking or needing support, rather than those who may be considering intervention*. Our preferred terminology refocuses the international searchlight back where it should always be: on the duty to protect communities from mass killing, women from systematic rape and children from starvation.

- Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.
- Thirdly, the responsibility to protect means not just the “responsibility to react,” but the “responsibility to prevent” and the “responsibility to rebuild” as well. It directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction
(Emphasis added)

This strikes a chord, too, with Ian Hollidays’s reassessment of just cause.¹⁴⁹

It is reasonable to argue that both the UK and US governments seem to have learned from Iraq the importance of planning for the aftermath of military intervention. The UK has established an inter-departmental Post Conflict Reconstruction Unit¹⁵⁰ whilst in the US Department of Defense Directive 3000¹⁵¹ of December 2005 seeks comprehensively to address perceived US weaknesses in this field at the strategic level. Staff at the US Army School of Advanced Military Studies at the Command and General Staff College have posited a need for ‘a collective shift in thinking from the Cold War mentality of fighting set-piece battles and then moving on to one that understands nation-building.’¹⁵²

As noted above, however, right intent must be underpinned by commitment of resources, which must include not just money and materiel, but time and political will. The importance of being prepared to commit energy and resources *over time* – working towards an ‘end state not an end date’ – was learned at cost by the West in interventions in Africa and the Balkans.¹⁵³ Nevertheless, we may still need to learn the importance of being prepared to invest sufficient political will. US involvement in Somalia ended in debacle because commitment to success was insufficient to ride-out domestic abhorrence at eighteen US deaths.* With (at Aug 2006) over 2500 US and over 100 UK fatalities in Iraq¹⁵⁴, political will seems to be holding. However, another indication of

* ‘Casualty aversion’ as a factor of *jus in bello* will be discussed in the next chapter.

political will is robustness in Rules of Engagement (RoE).^{*} Whilst these may be relatively straightforward in the conflict phase, post-conflict they can be more complex.

There is some argument that UK forces in Iraq have had to operate within the constraint of especially restrictive RoE, imposed not just to ensure proportionality and discrimination, but because the UK government fears both domestic and international political fall-out from greater civilian casualties should more robust RoE be allowed. However, more robust RoE, and a readiness to accept the civilian casualties that are an unfortunate concomitant of war, may be necessary both for force protection and mission success. Richard Holmes gives the following examples from the experience of British soldiers in Iraq: ‘... in the midst of what was evidently a substantial firefight, a military police officer ran about urging soldiers to fire only aimed shots. ...’ and ‘shooting an insurgent who had been involved in an ambush, but had jettisoned his weapon before running away from the ambush site, would have breached the rules. Shooting him if he had retained his weapon, however, would not.’¹⁵⁵ It should be noted that senior British commanders have insisted that their RoE are entirely adequate¹⁵⁶ but whether or not UK soldiers in Iraq have adequate RoE, the point remains that as a measure of political will RoE in interventions must be appropriate (including appropriately robust) as part of a demonstration of right intent. Richard Holmes has argued that if concern about loss of political capital is such that RoE are inadequate for mission success, then the intervention (if elective) ought not to be embarked upon.¹⁵⁷

Right intent, and reasonable chance of success – including the availability and willingness to commit all necessary resources – are, then, key elements in justifying humanitarian intervention.

3.3.4.3 Proper Authority in Humanitarian Intervention

George Monbiot, writing in *The Guardian*¹⁵⁸ suggests that there are three principal arguments commonly deployed against intervention. Firstly there is the argument that

^{*} Issues of culpability, accountability and soldiers’ conduct in complex operations will be discussed in the next chapter.

any state with the ability to intervene and readiness to commit the necessary resources, will invariably have wider interests in mind. We have largely dealt with this in the foregoing discussion of just cause and right intent and, as Monbiot acknowledges, there are occasions when an intervention for mixed or flawed motives is better than no intervention at all. The second objection is that intervention will only ever be directed against the weak. This is the argument that asks ‘why intervene to protect Kosovars from Serbia but not Chechens from Russia or Tibetans from China?’ The answer, of course, is that being unable to improve everything hardly requires that we improve nothing. For Monbiot, however, as for most commentators on intervention, the hardest argument to address is the third:

that as soon as we accept that an attack by a powerful nation against a weak one is legitimate, we open the door to any number of acts of conquest masquerading as humanitarian action.

... To accept that force can sometimes be a just means of relieving the suffering of an oppressed people is to hand a ready made excuse to every powerful nation that fancies an empire. To deny it is to tell some of the world’s most persecuted peoples that they must be left to rot.¹⁵⁹

Monbiot concludes that the dilemma can be solved only by a new UN Charter that ‘permits armed intervention for humanitarian purposes, but only when a series of rigorous tests have been met, and only when an overwhelming majority of all the world’s states have approved it. We need a charter that forbids nations with an obvious interest from participating.’¹⁶⁰

There are difficulties, however, with the ideal Monbiot proposes. Firstly, an important practical issue: Monbiot demands that those ‘with obvious interest’ be barred from involvement in the intervention. The reasoning behind this suggestion is clear; it gets us over the hurdle of cynicism and mixed motive. Practically, however, it is bound to be unworkable. Could we really expect the disinterested to expend the resources and risk their soldiers’ lives? Could we expect sufficient investment of political will, and would the public of disinterested nations lend their support? We must also ask whether those states which are powerful enough, rich enough and sufficiently militarily competent to intervene are ever really disinterested anywhere. Moreover, even if we could find sufficiently capable and willing disinterested states then they would almost inevitably be from outside the region of concern. Thus we might also expect them, however well-

motivated, to lack cultural empathy and understanding – a common criticism of Western-led interventions. On Monbiot's proposal, India would have been ruled out of any authorised intervention in Bangladesh, Tanzania in Uganda or NATO in Kosovo. Yet whatever the failings of these interventions, however mixed the motives, there can be little doubting the humanitarian good that resulted, which would almost certainly have been unrealised had intervention been constrained to the disinterested. Empirically it is clear that more often than not the disinterested are also the uninterested. Regional players with the greatest interest in regional peace, security, stability and future growth are likely to be both best placed, and most willing to intervene. So long as there is just cause and demonstrable right intent, we should not wish to preclude these players from intervention. What might be a more successful approach, then, is to allow execution by the interested but reserve authority to the disinterested. This brings us to the second objection to Monbiot's ideal.

The second objection to Monbiot's ideal goes right to the issue of sovereign authority. What Monbiot proposes, quite simply, resembles too closely what we already have; the UN Charter as it stands does allow of intervention with the approval of either of the two institutions that we take to represent the world's states: either the approval of the Security Council or, through a Uniting for Peace Resolution, a majority in the General Assembly. We have already seen that things as they stand are inadequate. Monbiot would doubtless respond that the problem is with the constitution of the Security Council and with the veto vested in the P5. Indeed, elsewhere he argues just this: that the Security Council as currently configured is a tyranny of the powerful.¹⁶¹ Although there exists the alternative of a Uniting for Peace resolution, this has rarely been attempted and never with any significant resultant action.

'Uniting for Peace' was a US initiative in 1950, to overcome the difficulty posed during the Korean emergency by the Soviet Union's ending its boycott of the UN and returning to its Security Council seat where it could exercise its veto. Established by General Assembly Resolution 377 (V) of 3 November 1950, the key element is the resolution that

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international

peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request thereof. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;¹⁶²

It might reasonably be asked if a situation can really be said to ‘shock the conscience of mankind’ if a majority support for intervention cannot be found in the General Assembly. However, the reality is that nations in the Assembly vote on wider than moral agendas and many would oppose intervention whatever the situation. A brief scan of the history of the use of Uniting for Peace Resolutions shows that it has in fact never been used with any material effect.¹⁶³

What Monbiot’s argument really boils down to, though, is who should wield the sovereign authority to intervene? A recurring theme throughout the last two chapters has been the UN’s inability adequately to fulfil this role; its decision-making processes are too unwieldy for the rapid response sometime needed to emerging crises; its decision-making fora are too beholden to the wider agendas of its constituent members; and it makes, after all, political not judicial decisions and pronouncements. If the Security Council is hobbled by the veto then, too, the General Assembly cannot be relied upon to use its Uniting for Peace powers to avoid the Council’s impasse because it, too, is beholden to wider political agendas and pressures. If we cannot, then, find an effective way of turning to a supra-national organisation for legal authority, perhaps we must recognise that decisions on intervention can rarely be taken effectively on legal bases but must rather be treated as moral judgements. Michael Walzer¹⁶⁴ appears to reach just such a conclusion, arguing that humanitarian intervention is akin to domestic law enforcement and yet – since the police are self-appointed and the law unilaterally enforced – it remains unpalatable to international lawyers.

The concern that coercion and domination of neighbouring states can be masked under a cloak of humanitarianism, gives rise to a continued preference for the legalist paradigm

(which is essentially non-interventionist). Walzer, however, argues that this does not preclude intervention; it only denies it legal recognition. We must recognise, then, that intervention decisions ‘belong not in the realm of law but of moral choice, which nations, like individuals must sometimes take.’¹⁶⁵ That nations must make their own moral judgements and not abrogate such decision-making to the UN, was an argument made by Margaret Thatcher in 1990¹⁶⁶, seeking to persuade a reluctant United States Administration to take forcible action to reverse Saddam Hussein’s annexation of Kuwait, without reverting to the UN for specific authority.

Removing intervention-decisions from the legal field to the moral does not necessarily imply unilateralism, the dangers of which we have noted; nor does it deny a role for the international community, whether or not recognised as represented by and through the UN. For even if we accept nations’ rights – or indeed obligations – to make unilateral decisions to intervene when certain criteria are met, we can insist that those decisions, more often than not necessarily *post hoc*, are subject to the moral, not legal, scrutiny of the community of states. This leads us to reach, then, a slightly awkward compromise that reserves to states the proper authority, required by just war doctrine, to determine when intervention is justified, but they must expect that their actions are subject to the moral scrutiny of the world at large. Readiness to intervene must then be a function of immediacy of crisis or pressing national interest, considered against degree of international support. The more pressing the requirement for action, in a nation’s own eyes, the less it need concern itself with international support and *vice versa* as represented at Figure 3-3. The more widespread the international support, and the more such support spans cultural divides, the more obvious that the intervention is justified; the less obvious the international support, or the narrower its base, then the more reluctant should a state be to intervene. It should then intervene if, contrary to the opinion stacked against it, it has a sincere belief in the urgency or criticality, from its own perspective, of action.

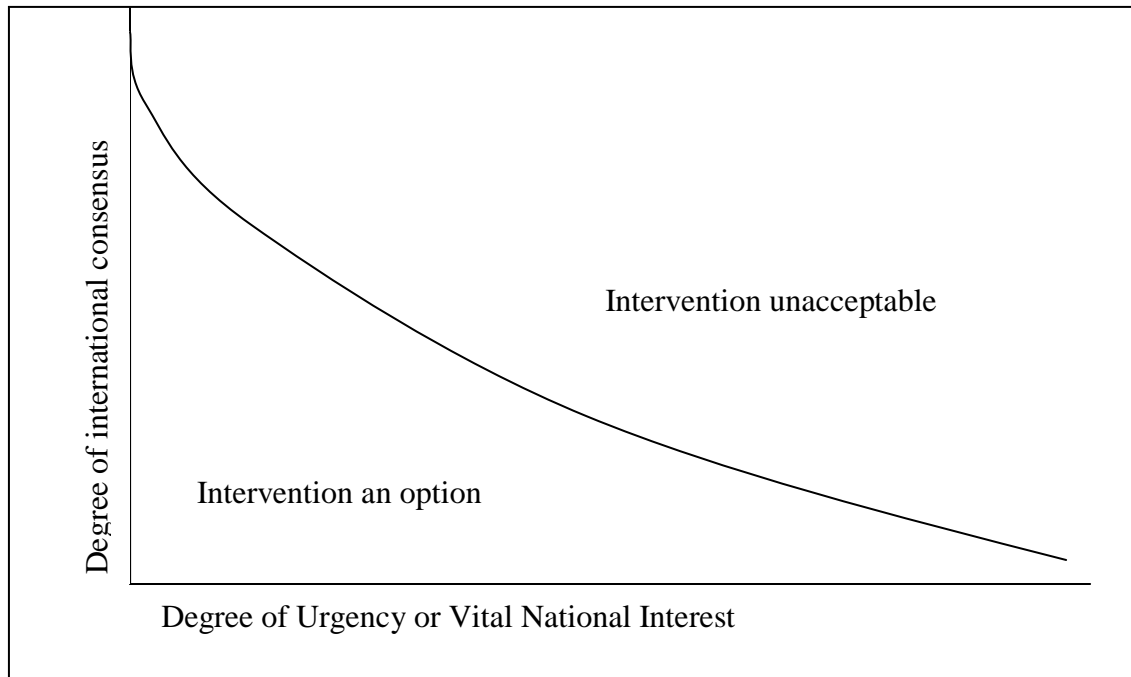


Figure 3-3 International Consensus *versus* Urgency When Determining Legitimacy of Intervention

We have to accept, then, that if we reserve ultimately to the UN or any similar supra-national body then, for all the reasons considered in Chapter 2, we will rarely see sufficient and timely enough action to prevent actions that ‘shock the conscience of humanity’. Such a realisation is hardly new as this extract from a letter, written in 1968 to the *New York Times*, shows:

... I don’t care much about international law, Biafra or Nigeria. Babies are dying ...

We still have food for export. Let’s get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it in with cannons if that will work. I can’t believe there is much political cost in feeding babies, but if there is let’s pay it; if we are going to be hated that’s the loveliest of grounds.

Forget the blather about international law, sovereignty and self-determination, all that abstract garbage; babies are starving to death.¹⁶⁷

3.3.5 Humanitarian Intervention: Tentative Conclusion

The tentative conclusion that must inevitably be drawn from this debate, is that the legalist paradigm – indeed any legal framework – simply cannot resolve the dilemma so eloquently articulated by Kofi Annan (see p185) between the political sovereignty and territorial integrity of states on the one hand, and the imperative to act, through use of

armed force when necessary, to prevent violations of individual rights so gross as to 'shock the conscience of mankind', on the other. The solution can only be found, therefore, in the political and moral arenas. Ultimately states will have to act as their political and moral instincts dictate. Politics is important because, in Western democracies at least, it will dictate that governments act in accordance with the mood of their electorates. And they will have to act in a manner constrained by consideration for international norms, convention and prevailing opinion. Both public and international opinion are influenced by an understanding of what is morally right; so too, then, must be the actions of even the most 'realist' government.

Just war, never simply formulaic, cannot solve the dilemma, nor offer a simple answer in any individual case, but it can provide the framework for debate and consideration. A greater focus on right intent may provide a more objectively measurable standard, than can emphasis on just cause – which is never easily discernable. Whilst, ideally, we should like sovereign authority to rest with the UN or some other supra national body in order to prevent nations acting wrongly under the guise of humanitarianism, experience has shown this to be unworkable. The compromise advanced here, is that we recognise that such decisions reside not in the legal sphere but in the moral (and also political). States may have to make intervention decisions on their own authority – though we have intuitively ruled out any sub-state grouping from this authority – but in the full understanding that they must stand ready fully to justify their actions not only to their own people but to the international society of states. This should not be taken as arguing that international law should be dispensed with; far from it. International law, the legal paradigm for use of force, and most importantly the presumption against intervention, all ensure that the onus is on the intervener to articulate the specific conditions which justify his deviation from the established norm. For, as Vattel argued: 'we must necessarily have recourse to certain rules of more certain and easy application, and this in the interest of the safety and welfare of the great society of the human race. These rules are those of the voluntary Law of Nations.'¹⁶⁸ The existence of such rules marks out intervention as the exception; something that must therefore be fully justified with the burden of proof placed on the state stepping beyond the law. The questions a state

must ask itself – and might well have asked of it – in determining the case for intervention are summarised at Figure 3.4

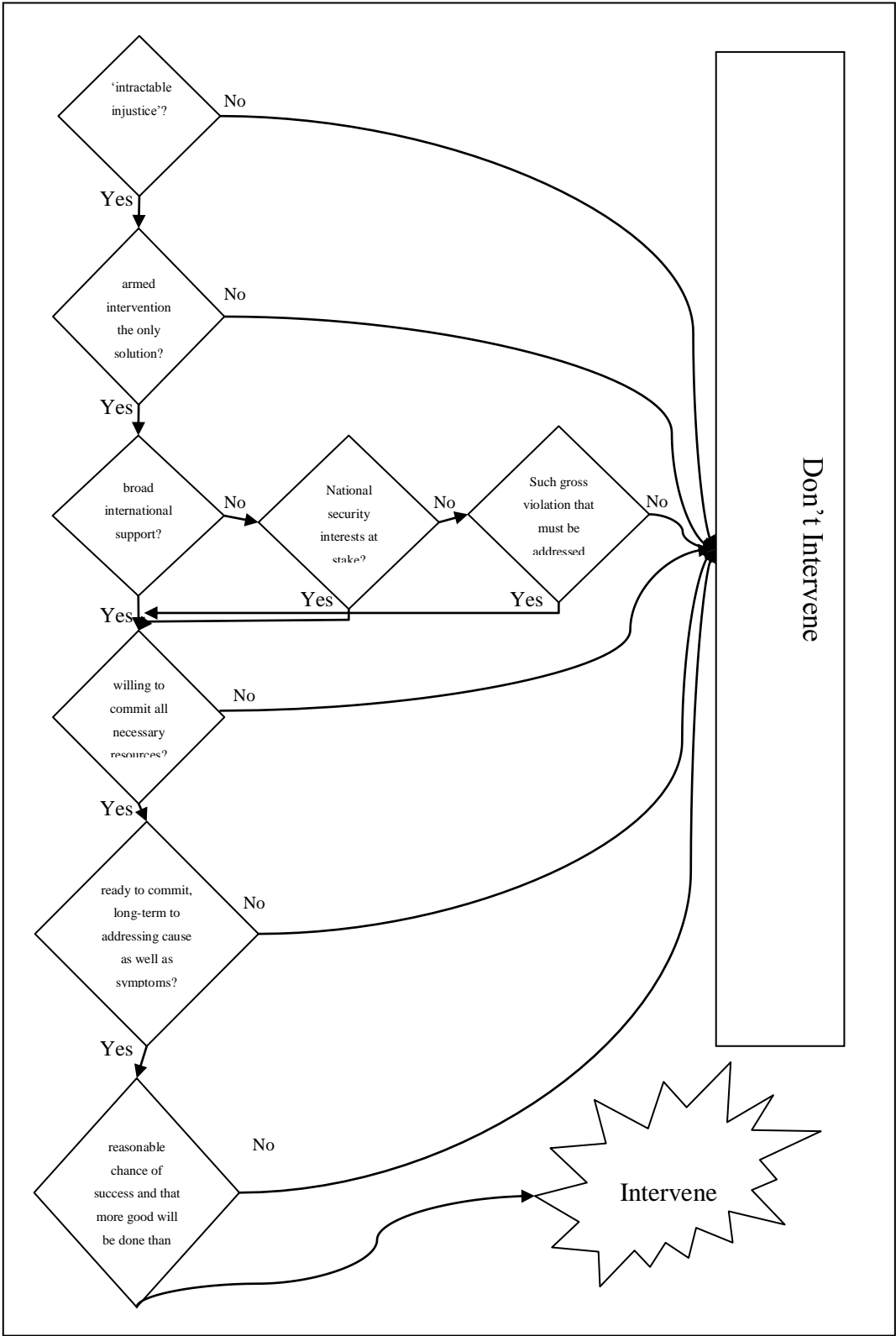


Figure 3-4 Justifying Intervention: a Flowchart (Source:Author)

Although beyond the scope of this thesis to delve further, it is right to acknowledge that the foregoing discussion of humanitarian intervention has focussed exclusively on the kinetic force of military intervention. It has not considered economic or other forms of interference in the domestic affairs of sovereign states and we should perhaps note that the use of economic sanctions can be more damaging – and less true to traditional *jus in bello* principles of discrimination and proportionality – than direct military action.

Having argued that just war principals can offer a broad but useful guide in moral decisions to intervene, it is right to conclude this section with an exhortation from the US Catholic Bishops, that just war principals be used holistically and not selectively, to guide moral discussion and not to validate a political agenda:

During the last decade, there has been increasing focus on the moral questions raised by the just-war tradition and its application to specific uses of force. We welcome this renewed attention and hope our own efforts have contributed to this dialogue. We also recognize that the application of these principles requires the exercise of the virtue of prudence; people of good will may differ on specific conclusions. The just-war tradition is not a weapon to be used to justify a political conclusion or a set of mechanical criteria that automatically yields a simple answer, but a way of moral reasoning to discern the ethical limits of action. Policy-makers, advocates and opponents of the use of force need to be careful not to apply the tradition selectively, simply to justify their own positions. Likewise, any application of just-war principles depends on the availability of accurate information not easily obtained in the pressured political context in which such choices must be made.¹⁶⁹

3.4 Preventive and Pre-emptive action

If humanitarian intervention has been the principal debate of *jus ad bellum* in the current era, then it is closely seconded by the issue of pre-emptive or preventive self-defence. We should first establish the difference between prevention and pre-emption. Writing at the end of the 1950s, Bernard Brodie¹⁷⁰ offered an understanding of the terms that, despite his use specifically in relation to nuclear war, can usefully serve a more general purpose. Brodie defines a preventive attack as ‘a premeditated attack by one country against another, which is unprovoked in the sense that it does not wait upon a specific

aggression or other overt action by the target state, and in which the chief and most immediate objective is the destruction of the latter's overall military power'¹⁷¹ Pre-emptive attack is characterised as one in which the enemy has 'already set in motion' its own attack but that attack is not yet 'consummated' or, indeed, 'well underway.'¹⁷² These distinctions are good enough for our purpose.

Historically there has not until recently been any great stay on preventive war. It can be reasonably argued that until the beginning of the Twentieth Century preventive war was the norm, entered into in order to preserve, or alter in the aggressor's favour, the so-called 'balance of power.' They were wars that anticipated a rival's future capacity as much as his future intent and sought engagement on the most favourable terms, largely predicated on an assumption that engagement was, in any case, at some stage inevitable. The Balkan Wars of the late Nineteenth/early Twentieth Century and, indeed, the First World War all stand as examples. Because of Russia's alliance with France, Germany had to assume that any war with one would lead to war with the other; she would have to fight on two fronts. Her answer to this (the Schlieffen Plan), based on Russia's predicted slower mobilisation, was a decisive attack on France (through Holland in the original but altered by von Moltke the Younger to be through Belgium). With France defeated the German army would be transferred to the East by railway. The timing left little margin for error or hesitation and, effectively, meant that any mobilisation by Russia, Germany or France must inevitably result in war.¹⁷³ Moreover, Germany in 1914 was keen that war with Russia should be fought before the military balance tilted further in the favour of the *entente* powers – particularly with the completion of strategic rail links between the Russian interior and the German frontier. Similarly, Austria-Hungary's determination to use Franz-Ferdinand's assassination as the pretext for war with Serbia can be seen as an example of preventive war.¹⁷⁴

In the context of international relations in which *raison d'état* was the guiding ethic, and one in which it might reasonably be argued that the costs of war, even for the loser, were marginal,¹⁷⁵ preventive war made sense. The wholesale destruction of the First World War changed that leading, *inter alia*, to the creation of the League of Nations and a growing conviction that only self-defence could justify resort to force; a concept that

reaches its epitome in the Charter of the United Nations. The advent of nuclear weapons raised the stakes, significantly, still further and yet for a brief window also resurrected an argument – in the West – in favour of preventive war. The simplicity of the argument is in many ways compelling: if nuclear war between the West and the Soviet bloc were to happen, it would be better for the West (and arguably the World) if it were to happen whilst the West's monopoly, and later superiority, in nuclear weapons would ensure a rapid and decisive victory and with minimal destruction.¹⁷⁶ If the practicality of the argument was undermined by the Soviet Union's rapid catching-up in nuclear capability, it was in any case based on highly questionable premises: firstly that war was inevitable, and secondly that any early attack on the Soviet Union would result in early and relatively uncostly victory. This particular case can be extrapolated to apply to all argument for preventive war: when past cases are considered arguments both about relative costs and inevitability of conflict are counter-factual; when future cases are considered the arguments for both are unsubstantiated. Indeed, the argument for inevitability risks being simply self-fulfilling! Moreover, as Brodie¹⁷⁷ points out, there is a moral argument, too, that cannot be ignored. Preventive war must result in the loss of lives (measured, potentially, in millions in the case of the nuclear war that was Brodie's concern) in the target state, of people 'mostly innocent of responsibility, on the inherently unprovable assumption that our safety requires it.' Such immorality, valuing a sense of security for US citizens over the lives of foreigners, Brodie, argued, was simply unacceptable to the American people to an extent that only a dictatorship could contemplate it:

It argues some want of imagination to assume – as many in fact once did assume – that the American people could acquiesce in such a deed and then go about their usual business of pursuing happiness, free of guilt as well as of fear. ... in fact there now exists a powerful and rigid barrier, largely on moral grounds to American planning of preventive war.

Indeed, such was the sensitivity of the issue that Major General Orvil Anderson was dismissed as Commandant of the US Air War College for publicly arguing in favour of preventive war.¹⁷⁸

Today, the barrier looks somewhat less rigid and we can see these arguments for preventive war re-emerging. Indeed, they were present in the stated justification for the

2003 Iraq War. In an interview for *The Christian Socialist*, then UK Defence Secretary Geoff Hoon argued that ‘... there was a threat, if not to the United Kingdom in the short term, then to our friends and allies in the Gulf region, as well as to the wider stability of the world if we had not intervened to deal with weapons of mass destruction in the hands of a regime like Saddam Hussein's. To that extent it was just.’¹⁷⁹

Earlier, in 2002, US President George W Bush expounded what has widely been deemed a doctrine of preventive war, in an address at a US Military Academy Graduation Parade¹⁸⁰:

For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations -- means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. *If we wait for threats to fully materialize, we will have waited too long.*

..... And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives. (Emphasis added)

The speech at West Point trailed ideas that were to be formally articulated in the US 2002 National Security Strategy¹⁸¹:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

... ..

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the

greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹⁸²

Mindful, perhaps, of international concern expressed in response to the President's words at West Point, the National Security Strategy does offer a slightly more conciliatory tone, recognizing the dangers inherent in promoting preventive war:

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will:

- build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;
- coordinate closely with allies to form a common assessment of the most dangerous threats; and
- continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.¹⁸³

Although the term 'pre-emptive' is used, there seemed to many to be an implication, at least, in the context of the term's use that what was meant was 'preventive' in the sense of the distinction established above. (See p224). It is worth, then, revisiting that distinction and considering it in greater depth.

As we have already seen (specifically at Section 1.2.4) the UN Charter limits states' right to use force to cases of self defence, and even then only 'until the Security Council has taken the measures necessary to re-establish international peace and security.'¹⁸⁴ Moreover, the Charter appears to restrict acts of self defence to reaction to hostilities already committed: 'Nothing in the present charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* ...'¹⁸⁵ (Emphasis added). However, weight of opinion favours the argument expressed as follows by Hugh Beach: 'It is clear that the term 'inherent' establishes that the right of self-defence has a basis in customary international law preceding the UN Charter and in no way dependent upon

it.¹⁸⁶ Furthermore, that ‘inherent’ right is generally taken to include a right to take action before any blow is actually struck. Michael Walzer argues that ‘(b)oth individuals and states can rightfully defend themselves against violence that is imminent but not actual; they can fire the first shots if they know themselves about to be attacked. This is a right recognized in domestic law and also in the legalist paradigm for international society.’¹⁸⁷ There must, however, be restrictions and in the realm of international law the most usually-cited are those emanating from the *Caroline Case*. This resulted from the British attack, in December 1837, on the US-owned steamer, the *Caroline*, which was being used to supply rebels in Canada across the Niagara River. British forces boarded the *Caroline*, killing two of the crew, set the ship afire and sent her over Niagara Falls. The US protested and it is Secretary of State Daniel Webster’s articulation of the justification required for acts of anticipatory self defence that have become convention: ‘while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence *is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*’¹⁸⁸ (Emphasis added).

The judgement of the ICJ in *Nicaragua vs the US*, already touched upon in Chapter 2, (see p93 *et seq*) would seem to reinforce the restrictions set out by Webster, placing emphasis not only on proportionality but also on necessity (‘no choice of means and no moment of deliberation’).¹⁸⁹ Again, international reaction to the Israeli attack on Iraq’s developing nuclear reactor at Osirak reaffirmed a very restrictive understanding of any right to pre-emptive self defence. In June 1981 Israeli aircraft attacked the reactor, close to Baghdad. Israel claimed that she was acting defensively as the reactor could give rise to an Iraqi nuclear weapons capability that would be an unacceptable threat to Israel’s security, given Saddam Hussein’s overt hostility.¹⁹⁰ Condemnation in the UN Security Council was unanimous.¹⁹¹ Remarkably, and uncharacteristically, even the US voted for the condemnatory resolution rather than merely abstaining or, as she often had on resolutions critical of Israel, using the veto. Members of the Security Council clearly felt that neither necessity nor immediacy could be argued since the plant was far from being operational and Iraq had proved herself compliant with the conditions of the Nuclear Non-Proliferation Treaty (which Israel had not). Byers judges the *opinio juris*

and state practice evinced by the Osirak episode to be one firmly set against a right to pre-emptive self-defence.¹⁹²

Yet this has not always been the case. By contrast, when Israel attacked Egypt pre-emptively in 1967, there was general acceptance that she had acted with justification. The series of UN Security Council Resolutions passed following the Israeli attack demanded a cease-fire but fell short of any condemnation of the Israeli action.¹⁹³ UNSCR 242 of 22 November 1967¹⁹⁴ does, however, call for the withdrawal of Israeli forces from the occupied territories. Hugh Beach concludes, therefore, that ‘the international community condoned Israel’s pre-emptive action on the grounds that the UAR had clearly signalled its imminent intention to attack, while rejecting as disproportionate Israel’s occupation of the whole of Sinai.’¹⁹⁵ Walzer, whilst fully accepting the Israeli action as legitimate, nevertheless sees it requiring a major revision of the legalist paradigm.¹⁹⁶ This is because, despite Egyptian rhetoric and aggressive deployment of troops close to Israel’s borders, it is far from clear that any actual attack was intended. Rather, argues Walzer, Nasser’s intention was to create a climate of fear and thus seriously undermine Israel’s security without actually attacking at that time; he could do this because of the imbalance of forces. Israel was almost entirely dependent on the mobilization of reservists who could not be kept on active duty indefinitely, whilst Egypt and her allies, Syria and Iraq, could keep large numbers of troops deployed, threateningly, along the frontier for as long as they wished. Walzer describes the Israeli position, therefore, as one of ‘just fear’. He formulates the revised legalist paradigm as: ‘States may use military force in the case of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence. Under such circumstances it can fairly be said that they have been forced to fight and that they are victims of aggression.’¹⁹⁷ Taking a domestic law analogy, he asks us to consider the circumstances of an unstable society: ‘a state under threat is like an individual hunted by an enemy who has announced his intention of killing or injuring him. Surely such a person may surprise his hunter, if he is able to do so.’¹⁹⁸

The different international responses to the *Caroline* Case, Osirak and the 1967 Six-Day War suggest that rather than a clear cut right or wrong view of anticipatory action,

international *opinio juris* recognises a spectrum at one end of which is the very restrictive interpretation of Webster's conditions and at the other the over-permissive interpretation by Israel over Osirak. Along the spectrum are cases where opinion is mixed or where there is partial acceptance of the justification; acceptance, for example that initial Israeli action in 1967 was legitimate but that its subsequent desire to consolidate territorial gains made by war was not.

The case being advanced today, most notably by US President George W Bush's Administration, but with considerable support from Tony Blair's government in the UK, has been centred on a view that a changed security environment requires new responses, including a right to preventive use of force. It is summarised in this extract from the report of the 33rd IFPA-Fletcher* Conference on National Security Strategy and Policy:

Changing threats mean changing our responses. Terrorism and the proliferation of weapons of mass destruction (WMD) have forced a fundamental reshaping of U.S. national security strategy. Today, the threats to the United States are diffused and hidden, encompassing adversaries who, through asymmetric means including the use of WMDs, are capable of inflicting catastrophic damage. ... No longer can the United States wait passively while hostile states and terrorist organizations conduct terrorist operations, obtain WMD capabilities, and promulgate hatred.

We can interpret this as arguing that WMD and terrorist means have significantly increased the time scale in which there is 'no moment of deliberation'; waiting for imminence is too late and thus the just war requirement of last resort is met very much sooner than is the case when the threat is conventional. To this might be added an argument that terrorists, and particularly those predisposed towards suicide attacks, are not amenable to deterrence. The danger of stretching the interpretation of existing conventions in this way is that it can be used to justify aggression by others, too. A rights-based understanding of self-defence is reciprocal. An aggressor loses his right to life through his aggression. The current US argument, though, is that in developing a capability for aggression – however non-imminent – a state or non-state entity is as guilty as one that commits an act of aggression and so similarly loses its right to life. This follows the logic of the domestic analogy that conspiring or preparing to commit a

* Institute for Foreign Policy Analysis and the International Security Studies Program of the Fletcher School, Tufts University.

crime is in itself a crime. The difficulty then is that the doctrine of preventive war that is at least implied by the National Security Strategy could itself, from a moral standpoint, also be seen as creating the wrongful act invoking a justified self-defence response.¹⁹⁹

Arguments for greater permissiveness in pre-emptive war to counter terrorism are based on a view that the traditional presumption against pre-emption is itself flawed when terrorism is brought into the equation. The UN Charter is founded on a firm understanding that use of force can only be justified when it is defensive. A world in which pre-emption is an accepted norm is a dangerous one because any state may believe it is about to be attacked and, therefore, attack its potential attacker. The attacked state similarly may detect an imminent attack and attempt to pre-empt; a viscous circle of fear and anticipatory attack is established. By contrast, a world in which there is a widely respected norm of no-first-use, whilst it may not be entirely safe – there may always be transgressors – is a considerably safer one. Henry Shue puts the case thus:

The world of no-first-use is far from being a world of full security or a worry-free world. One must always worry to some extent about norm-violators. A nation that violates the norm and attacks in spite of it may inflict terrible damage on its victim. But the world with the well-established norm of no-first-use has one huge advantage: namely, it is a world from which a major reason for starting wars has been removed. The reason that has been removed is the reasonable fear that the price of not attacking first is most likely to be suffering an attack oneself.²⁰⁰

In the case of terrorism, it is suggested, this argument no longer holds: the terrorist is not, in the sense we generally understand the term, a rational actor whose actions towards us depend on ours toward him; it is not fear of attack by us that motivates the terrorist to attack us. He intends to attack us anyway so our best defence is a pre-emptive strike.

If we leave aside the semantic, but important, argument that terrorism is a tactic not an enemy, the argument is in any case flawed in that it assumes that all terrorists are similar in motivation and (ir)rationality and it provides a case at best for pre-emption but not for preventive war. Henry Shue objects on two grounds: firstly, an admittedly

unproven case that preventive action might actually increase terrorist numbers by adding to those who believe they have cause for animosity/hatred towards us; secondly that it holds only in the case of what he terms ‘unwaveringly predatory’ terrorists – those who would harm us, whatever our actions. By generalising a right to preventive attack we almost certainly increase the number of those who have reason to fear us and thus to justify their own attacks upon us:

A sure-fire way to give people of many different kinds a compelling incentive to act like predatory terrorists, irrespective of whether they started out as predatory terrorists, is to treat them all like predatory terrorists. The underlying logic is this: those who are fairly confident that they will not be attacked need not attack out of fear that they will otherwise suffer attack, but those who do fear attack do have a reason to attempt to attack first. The absolutely vital question about preventive attack, then, from the point of view of one’s own safety, is: who is in fact likely to fear being attacked?²⁰¹

Arguments in favour of a more permissive approach to pre-emption – toward the preventive – have tended to focus on the combined threat of terrorists (largely immune from deterrence) and WMD (whose destructive power requires a revised understanding of imminence. For example, US Army Lieutenant Colonel John Mattox argues thus:

the present threat of terrorism poses a very different set of challenges from those encountered during the Cold War – especially pertaining to the threatened use of CBRNE* weapons. we must take into account the reality that the lawless terrorists that threaten the West appear to have no intention to play by the traditional rules that for centuries have governed the just conduct of war. that does *not* mean that the West should feel at liberty to wage war without moral constraint. Rather, it means that we must reassess how much malevolent preparation we are willing to tolerate from known terrorists before we consider that action is morally justifiable. In the age of swords, one did not respond until a sword was raised. In the age of gunpowder, one waited until a shot was fired. The question is, in the age of terrorists armed or seeking to be armed with CBRNE weapons, what constitutes an intolerable offense and how long does morality require that we wait before we respond.²⁰²

The logic of Mattox’s concern is clear and compelling: terrorists organising, planning and equipping for attacks are by so-doing already committing an act of aggression that can reasonably justify pre-emptive action. The case could even be made – as indeed it often is by Israel, that the terrorists are already engaged in war; the first hostile act has occurred and therefore attacks on them and those who harbour them are not pre-emptive

* CBRNE = Chemical, Biological, Radiological, Nuclear and High Energy.

at all but retaliatory. It is interesting to note that pre-emption is usually only really debated as an issue of *jus ad bellum* and not also one of *jus in bello*. Once conflict has been joined, soldiers are not required to demonstrate imminence of threat to justify killing enemy troops: enemy troops are legitimate targets on their way to (or, indeed, from) the combat zone, when eating, sleeping or otherwise engaged in unthreatening activity; from a military perspective it would be ludicrous to argue otherwise. (An exception to this, perhaps, was the controversy surrounding the sinking of the Argentine battleship *Belgrano* at the outset of the Falklands conflict). On the other hand, in peacekeeping a different ethic is used – more akin, we have seen argued, to that of the policeman; in such cases last resort is something required to be determined by soldiers before each and every act of violence. Along the spectrum of conflict the situation is less clear. Yet, much of the debate about targeted-killing or about RoE in insurgency would have rather less substance if asymmetric war were recognised first and foremost as war. Then issues of pre-emption no longer feature in the *jus ad bellum*; battle has been joined. They need only be considered as part of the *jus in bello* and here it is proportionality and discrimination that are the criteria of legitimacy, not last resort. So long as the response meets the *jus in bello* requirements of proportionality and discrimination it is then acceptable in just war terms. (The following chapter will consider in more depth *jus in bello* issues associated with so-called asymmetric war).

This is fine so far as it goes. The difficulty is that this same rationale then seems to be transferred by some, as indeed in the US National Security Strategy of 2002, to a justification for the US action against Iraq. Vice-President Dick Cheney, for instance, argued that²⁰³:

... the President and I never for a moment forget our number one responsibility: to protect the American people against further attack, and to win the war that began last September 11th.

... ..

In the days of the Cold War, we were able to manage the threat with strategies of deterrence and containment. But it's a lot tougher to deter enemies who have no country to defend. And containment is not possible when dictators obtain weapons of mass destruction, and are prepared to share them with terrorists who intend to inflict catastrophic casualties on the United States.

... ..

In the past decade, Saddam has systematically broken each of these agreements. The Iraqi regime has in fact been very busy enhancing its capabilities in the field of chemical and biological agents. And they continue to pursue the nuclear program they began so many years ago

..... Many of us are convinced that Saddam will acquire nuclear weapons fairly soon.

Just how soon, we cannot really gauge.

... ..

Should all his ambitions be realized, the implications would be enormous for the Middle East, for the United States, and for the peace of the world. The whole range of weapons of mass destruction then would rest in the hands of a dictator who has already shown his willingness to use such weapons, and has done so, both in his war with Iran and against his own people. Armed with an arsenal of these weapons of terror, and seated atop ten percent of the world's oil reserves, Saddam Hussein could then be expected to seek domination of the entire Middle East, take control of a great portion of the world's energy supplies, directly threaten America's friends throughout the region, and subject the United States or any other nation to nuclear blackmail.

Simply stated, there is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us. And there is no doubt that his aggressive regional ambitions will lead him into future confrontations with his neighbors -- confrontations that will involve both the weapons he has today, and the ones he will continue to develop with his oil wealth.

... ... As President Bush has said, time is not on our side. Deliverable weapons of mass destruction in the hands of a terror network, or a murderous dictator, or the two working together, constitutes as grave a threat as can be imagined. The risks of inaction are far greater than the risk of action.

... ..

As one of those who worked to assemble the Gulf War coalition, I can tell you that our job then would have been infinitely more difficult in the face of a nuclear-armed Saddam Hussein. And many of those who now argue that we should act only if he gets a nuclear weapon, would then turn around and say that we cannot act because he has a nuclear weapon. At bottom, that argument counsels a course of inaction that itself could have devastating consequences for many countries, including our own.

Yet, since no meaningful evidence has been presented of any connection between Iraq's alleged WMD programmes and terrorist groups, or of any imminent threat by Iraq towards the West or even her neighbours, the US action is more reasonably interpreted

as preventive. It did not satisfy the conditions of last resort; there were other means available, indeed being actively urged by other major international players. In other words a reasonable argument in favour of justifying pre-emption has been transferred, without further consideration or test, to justify preventive war.

Wide ranging concerns over the emergence of a new doctrine of pre-emptive self-defence that errs towards preventive action, were also raised by the Church of England in its Public Affairs Unit's submission to the House of Commons Foreign Affairs Select Committee:

... (T)he current controversy surrounding the legitimacy of the war, fuelled by the present lack of post-war evidence for the existence of WMDs in Iraq, highlight the moral and political dilemmas intrinsic to the concept of pre-emptive military action. If governments intend to use pre-emptive defence as justification for military action then further thought needs to be given to developing clear and transparent rules underpinning its use. In the absence of a clear and imminent threat to international peace and security, pre-emptive military action inevitably raises particular ethical questions as to just cause, last resort and right intent.

From an ethical perspective the justice of a pre-emptive attack requires demonstrable and compelling evidence of the hostile intent and capability of a perceived aggressor. Moreover just war theory requires that other less belligerent means of averting the threat must have been considered and found wanting for good cause. Pre-emptive action can itself be destabilising to and a breach of international peace. As a result it is crucial that states considering pre-emptive action have more than probable cause to believe they must attack. Otherwise, questions will always be asked as to whether a pre-emptive attack was itself nothing more than an act of aggression.

.... regardless of any future discovery of WMDs in Iraq, clearer guidelines need to be established concerning the use of pre-emptive military action. Such guidelines are important both for the credibility and authority of government and for public trust and confidence.²⁰⁴

A further difficulty is that unlike earlier arguments for preventive war (and they appear in Cicero, Gentili and Burke) which were based on maintenance of a balance of power, the current US arguments can, in part at least, be interpreted as seeking to maintain an imbalance of power – ensuring that no state could develop weapons that would allow it to challenge US military superiority. Adopting a permissive stance on pre-emption (the

‘Osirak’ end of the scale) risks a significant increase in the occasions of use of armed force. Byers argues that

(a) broad right of pre-emptive self-defence would also introduce uncertainties into international relations. Who would decide that a potential threat justifies pre-emptive action? How does one protect against opportunistic military interventions justified under the guise of pre-emptive self-defence? Do we wish to accord the same extended right to India, Pakistan or Israel.....? Could the development of such a right prompt potential targets into striking first, using rather than losing their biological, chemical and nuclear weapons?²⁰⁵

From a just war perspective, the legitimacy of pre-emptive action must surely hinge on last resort. However, judging when last resort has been reached is not easy; it is a largely subjective judgement clearly influenced by relationship to the perceived threat. Walzer’s case in support of Israel suggests that although actual attack by Egypt may not have been imminent, her intent was to undermine Israel’s security and that, in any meaningful sense, last resort had been reached in that there was no realistic possibility of a diplomatic solution and no safe way for Israel to delay taking action. By contrast, over Osirak, no such case of necessity could reasonably be made. Again, the 2003 Iraq war demonstrates the dangers of over-stating a potential long-term threat as justification for immediate action. Thomas Ricks²⁰⁶ cites the *New York Times* as an example of just this:

U.S. SAYS HUSSEIN INTENSIFIES QUEST FOR A BOMB PARTS, it reported on page one of the edition of Sunday, September 8. “The closer Saddam Hussein gets to a nuclear weapon, the harder he will be to deal with,” it quoted a senior administration official as warning. It related that hardliners were saying that the first irrefutable evidence “may be a mushroom cloud.”

The US Deputy Defense Secretary Paul Wolfowitz also questioned traditional understanding of imminence:

We cannot wait to act until the threat is imminent. The notion that we can wait to prepare assumes that we will know when the threat is imminent. ...
... Just when were the attacks of September 11th imminent? Certainly they were imminent on September 10th, although we didn’t know it. ... Anyone who believes that we can wait until we have certain knowledge that attacks are imminent, has failed to connect the dots that led to September 11th.²⁰⁷

The issue was again confronted head-on by President Bush in a television interview in February 2004: ‘I believe it is essential – that when we see a threat, we deal with those

threats before they become imminent. It's too late if they become imminent. It's too late in this new kind of war.'²⁰⁸

It is clear, then, that the contemporary security environment offers challenges to our traditional understanding of justified pre-emption. However, the challenge need not be so much to the theory as the practical application. The new threats – in particular the combined threat of WMD and terrorism – may require a revised understanding of imminence but this does not argue for abandoning last resort as a principle; it simply suggests that it is reached earlier in time or distance. If we are to justify pre-emption without such justification acting as a cover for unjustifiable preventive war, then, as is the case with intervention, we need a framework of understanding within which to conduct the debate. The clear cut rule established by Webster in 1838 may no longer be appropriate but *carte blanche* in pre-emption, like unfettered interventionism, offers a prospect of a dangerous, violent and unstable world. Byers warns that stretching the definition of imminence introduces

much more ambiguity into the law. This ambiguity could in turn, allow power and influence to play a greater role in the application of the law. In future, whether the criteria of imminence is fulfilled would depend in large part on the factual circumstances – as assessed by individual states and groups of states. And the ability of the powerful to influence these assessments could be considerable.....²⁰⁹

This would inevitably leave the most powerful countries, and the United States in particular, with a greater freedom of action. Similarly, Rob de Wijk warns of the difficulty of amending existing convention:

Where does one draw the line? Is it a perceived intent of a state to acquire weapons of mass destruction or to support international terrorism? Or is it the possession of these weapons or the existence of terrorist groups in a state? Thus, critics of the 2002 National Security Strategy feared that the setting of new standards for pre-emption could result in the death of the UN Charter framework.²¹⁰

Perhaps, then, as with intervention, we are better claiming exceptional violation rather than changing the rules. Moreover, alongside last resort we must consider the *jus ad bellum* tenet of right authority. Pre-emptive action is much more palatable if it enjoys widespread international support as we have seen from the contrasting cases of the 1967 Arab-Israeli war and the 1982 attack on the Osirak reactor.

The UN formally considered the case for adapting the existing stay on preventive action in the Secretary General's High Level Panel on Threats, Challenges and Change. The panel's conclusion was set firmly against any doctrine of unilateral preventive action:

(I)f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option.

For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non - intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.²¹¹

The Panel's conclusion was that the Security Council, in considering whether to authorize use of force, should consider, at least, the following five criteria: Seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences. In other word, it endorsed just war doctrine as the continued framework for debate.

Again, as with intervention, it may be the case that a state or group of states feels the situation is such that they cannot seek authority or consensus in advance; or, indeed, the extraneous factors that impact on the decision making process of the Security Council may be thought such that the formal expression of international consensus represented by its authority is simply beyond what can be achieved. In such cases a state or group of states may feel compelled to act unilaterally. Nevertheless, for all the reasons explained in Chapter 2, they would be well advised to be certain that their use of force can be justified at least retrospectively; that it will be viewed across a wide spectrum of international opinion to have been legitimate even if, strictly, illegal (to borrow the conclusion of the International Kosovo Commission). What is required is that any act of pre-emption can pass what US Presidential candidate John Kerry termed the 'global test'(see p121)*.

* Republicans seized on the term to suggest Kerry would cede US defence to international veto; he then denied that by 'global' he had meant 'international'.

3.5 Summary

Care must be taken in making predictions about future war; we have only history to guide and it would seem to suggest that however the character of war changes to reflect the age, there are enduring aspects to its nature. Nevertheless, in considering the future relevance of just war doctrine and the challenges posed to it, we must attempt some analysis of the apparent trends in conflict.

In the near- to mid-term the identifiable trends are that warfare is becoming more complex. Old boundaries and distinctions are becoming blurred or being breached; a range of new protagonists is appearing – or adopting a more significant role; and new technologies are impacting both on who can participate in conflict and how. Advanced technologies – especially information and computing technologies – once driven by military requirements, and the preserve of modern states, are now civilian market-driven, cheap and readily available to all. ‘Security’ is no longer synonymous with territorial defence and states’ security interests can no longer be met by largely home-based military forces; a much broader approach is required, involving many more agencies as well as a readiness to project power – both hard and soft – further afield. From the perspective of *jus ad bellum* – dealt with in this chapter – the particular areas of challenge this throws up are those of intervention and of pre-emption/preventive war. For *jus in bello* – to be considered in the next chapter – the principal areas of concern are the moral implications of technological advancement, especially the tendency to remove the moral agent (the fighting man or woman) ever further from the battlefield; the West’s greater willingness to engage in conflict but tendency – in part through technological means – to transfer risk not only to the enemy (quite reasonably) but also to the innocent, because of an unwillingness to accept casualties; the engagement of new protagonists, and in particular the large increase in the use of child soldiers, and the widening use of civilian contractors and Private Military Companies (PMCs); and the resort by the West’s opponents to so-called asymmetric means to counter the West’s unassailable superiority in conventional arms.

This chapter's discussion of intervention considered the perceived inadequacies of the current, legal-based paradigm for use of force. This paradigm establishes, in effect, that only a response to state-on-state aggression is a just cause for war; its moral and legal focus has been almost exclusively on the rights and personality of the state. The paradigm has failed because of structural inadequacies – specifically the P5 veto in the UN Security Council; because it lacks an enforcement mechanism; and because states have demonstrated a lack of faith in the measures established for pacific measures of dispute resolution.

Furthermore, the greater ability to intervene militarily as a result of the ending of the Cold War inter-bloc tensions, has coincided with a hugely inflated desire to intervene as the West's (in particular) value-set has shifted away from protecting and promoting the rights of states and in favour of valuing, primarily, the rights of individuals. A paradigm that saw inter-state conflict as the major threat to peace and security, and placed security prior to justice, has become outmoded. A tension has then emerged between liberal objectives and the illiberal means necessary to achieve them. At the same time the dangers of unfettered interventionism are recognised. The tentative conclusion is that a framework is needed for justified intervention and the tenets of just war doctrine – with some adaptation in understanding – can provide this. In particular greater focus is needed on right intent, demonstrated through sound planning for and full commitment to a better peace (what some are suggesting is, in fact, a third aspect to just war, namely *jus post-bellum*). Also required is a broad understanding of proper authority. Whilst it may not be practical to achieve this in a legal sense, it is represented morally by broad-based, cross-cultural international approval, which circumstances may require is turned to for *post facto* legitimisation.

The second significant challenge to our understanding of *jus ad bellum* comes from a renewed argument in favour of anticipatory war – preventive or pre-emptive. Preventive war is understood as one launched not in response to any specific aggression – actual or reasonably perceived to have been set in train – but rather a supposed future threat; it is aimed at preventing actualisation of a potential enemy's anticipated threat capability in order to preserve a favourable (to the preventing power) status quo. By

contrast, pre-emptive war is launched against an attack already substantially set in motion, though not yet fully actualised.

Many wars of the 19th and early 20th Centuries can be perceived as preventive but as the costs of war have increased so the counter-factual arguments on which the case for preventive war must rest, have looked increasingly insufficient. However, in response to the proliferation of WMD and a global terrorist threat, arguments for preventive action have re-surfaced (though often mislabelled 'pre-emptive'). Just war tenets of proportionality and last resort are both invoked in the case against anticipatory war: denying prevention and constraining pre-emption. Nevertheless, cases are rarely clear cut and *opinio juris* suggests a spectrum of international permissiveness towards anticipatory action.

The re-emergent case in favour of anticipatory action today rests on the changing nature of the threat: WMD are seen as overriding the stay of imminence because imminence is too late for effective response; terrorism – and especially suicide-terrorism – argues against the alternative strategy of deterrence because the would be attackers are simply non-susceptible to it. The standard rebuttal of a right to anticipatory action – that it inclines all sides to perceive greater threat, thus increasing the likelihood of a pre-emptive attack, in an unending vicious circle – is held not to apply in the case of a terrorist threat. Terrorists – it is argued – are neither rational actors nor do their acts depend upon ours. They are not acting in response to a threat from us but would attack us whatever our stance, therefore anticipatory action does not increase the threat. However, this argument is itself flawed. It treats terrorism as if it were an enemy and not a tactic and ascribes a similar motivation to all those who would use terrorism against us. A further significant problem with the currently emergent (and predominantly US-led) doctrine of anticipatory action is that it seems to be confusing pre-emptive and preventive action: using reasonable sounding arguments for the former to justify the latter.

It will likely always be the case that when it comes to their own self-defence, nations will act as they believe necessary, regardless of any international legal stay. However,

as with interventions, they will also have to justify their action, even if retrospectively, to both a domestic and international audience. In doing so the criteria established by the UN Secretary General's High Level Panel, founded firmly in the just war tradition, provide a sound guide.

Apparent trends in the character of conflict suggest that the greatest challenge to our conception of *jus ad bellum* will come from a greater will to intervene – contra the 20th Century emergence of self defence as the only just cause – and a tendency to interpret current threats as justifying a return to preventive wars. In both cases, however, it is clear that just war remains a valid framework for debating the difficult issues.

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- ¹⁹⁶ M Walzer, *op cit*, pp82-85.
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- ¹⁹⁹ For a comprehensive examination of the complexities of rights-based justifications for self defence, see D Rodin, *War and Self-Defence* (Oxford: Clarendon Press, 2002), especially Chapter 4.
- ²⁰⁰ H Shue, 'Prevention, Preemption and Predation: Why the Bush Strategy is Dangerous' in *Philosophic Exchange*, No 35 (2004-2005), pp5-17.
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²⁰⁹ M Byers, *op cit*, pp78-79.

²¹⁰ R de Wijk, *op cit*, p74.

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CHAPTER 4: ISSUES OF *JUS IN BELLO*

4.1 Introductory Comments

This final substantive chapter turns to issues of *jus in bello*: proper conduct in warfare. Just war doctrine requires two things for this: proportionality and discrimination; that is that actions in war, however necessary they are perceived to be, must have a military necessity that is in proportion to the harm they do; and there must be due discrimination between those who are legitimate targets in war and those who are innocent bystanders. The so-called doctrine of double effect allows that military actions may be undertaken in the knowledge that there will be injury to the innocent, provided that such casualties are unintended – even though foreseen – and that the test of proportionality is passed. There is, of course, a great deal of subjective judgement to be made in this but, as has been argued throughout this thesis, moral legitimacy rests on a broad-based consensus that one's actions are reasonable.

As with issues of *jus ad bellum*, the 20th Century, in particular, saw increasingly strident attempts to codify into international law what had erstwhile been moral (and political) judgements. International Humanitarian Law (IHL) (or, as the military knows it, Law of Armed Conflict (LOAC)) really began in earnest with the signing of the Geneva Convention of 1864. Today the capstone of IHL is provided by the four Geneva Conventions of 1949 and their two associated Additional Protocols (AP) of 1977¹. *Convention I, For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, sets out protection for members of the armed forces who become wounded or sick and *Convention II* extends the same protections to naval forces. *Convention III, Relative to the Treatment of Prisoners of War* is a highly detailed and bureaucratic listing of the rights of prisoners of war (even extending to the requirement for captors to provide access to musical instruments etc!) *Convention IV, Relative to the Protection of Civilian Persons in Time of War*, deals with the protection of the civilian population. The 1977 APs, introduced as the prevalence of inter-state conflict diminished, extend the provisions of the conventions to non-traditional forms of

warfare. AP I deals with ‘victims of wars against racist regimes and wars of self determination’, that is it extends the rights and obligations of the Conventions to non-state entities engaged in conflict. AP II further widens the scope of the Conventions to include ‘internal conflicts’ in cases where an armed opposition controls enough territory for them to be capable of ‘sustained operations’.

There have been many further treaties, particularly those aimed at limiting or banning particular weapon types – usually on the grounds of disproportionate suffering, or of their indiscriminate nature, so still founded firmly on the two *jus in bello* tenets. Furthermore, in recent years a second body of international law, Human Rights Law, has also begun to impact on the conduct of armed forces (at least those of states who agree to be bound by it). This reflects the trend recognised elsewhere in this thesis, away from a system focussed primarily on the rights and obligations of states and towards one focussed on the rights (if not yet the obligations) of individuals. This is but one trend with which armed forces today must contend in their conduct of war.

However, just as we have seen with the codification of *jus ad bellum*, IHL may be insufficient as a guide to soldiers faced with warfare of an increasingly complex character. This Chapter, then, aims to consider how emerging trends in warfare may impact on our conduct of it and challenge our concepts of *jus in bello*. To provide a structure for the analysis, though recognising that in reality the two are tightly intertwined, the argument will proceed by first examining issues related to how Western democracies (predominantly the US and UK) expect to wage war; and then issues of their response to the preferred techniques of likely enemies (so-called ‘asymmetric’ warfare). The final section will consider an issue that relates to how both Western nations and their potential opponents wage war: the addition to the battlefield of a range of new protagonists.

4.2 Issues of Jus in Bello 1: How the West Wages War

Most literature on contemporary conflict focuses on how the West must respond to emerging trends in warfare likely to be used against it, especially the tendency to seek

asymmetrical means to render ineffective the West's superiority in conventional and high-technology weaponry. Less considered is the way the West makes war when it has the initiative. As we shall see it too has sought – and continues to seek – asymmetries. The West's preferred means of making war will also have an impact on *jus in bello*.

The Theory of Democratic Peace, with its roots in Kant's *Perpetual Peace*² holds that democracies do not go to war with one another.³ It is the philosophical underpinning for the Clinton Doctrine, articulated in the 1995 US National Security Document, *A Strategy of Engagement and Enlargement*,⁴ which establishes three pillars for US foreign policy, summarised as 'the retention of global military predominance, the quest for continued economic prosperity, and the promotion of free market democracy abroad.'⁵ Thus it also provided the logic for NATO expansion and also for the policy of humanitarian intervention. Put simply, the theory supposes that since in a democracy it is the people who determine government policy, and since it is the people who suffer most in war, democracies will be inclined to avoid war; since they can further ascribe similar views and cultural outlook to other democracies, their positions are mutually reinforcing and democracies are unlikely to fight each other. Realists/neo-realists are unconvinced by the supposed empirical evidence which to a degree relies on the definitions used of 'democracy' and 'war'.

Whether or not democracies ever use force against other democracies, evidence of the last century and first half-decade of the current one suggest that Western democracies are anything but averse to use of force. De Wijk argues that whether on moral grounds or for the protection of vital interests, coercion of others has long been a characteristic of liberal democracies.⁶ He identifies three instruments of coercion: political measures, economic sanction and military force.⁷ European nations have tended to favour political/economic measures whilst the US and a small number of allies, notably the UK, recently have leaned more towards military means. However, even when there is a preference for non-military means – coercive diplomacy or economic pressure – such intervention in the affairs of others has had mixed success and there are times when decisive action (invariably military) is necessary. (Non-decisive use of military force has also frequently been a cause of failed policy).

Münkler⁸ suggests that the Democratic Peace theory is better understood as showing that democracies are unwilling – even incapable – of fighting *symmetrical* wars (which might also suggest they are incapable of fighting each other). The logic behind this assertion is that symmetrical wars are likely to be expensive (financially and in lives) whereas wars exploiting an asymmetry – in numerical strength, technological means, or tactics – can be expected to bring about relatively swift and cheap victory. This line of thinking can be seen clearly reflected in the Weinberger-Powell Doctrine, for example (see p203). If we follow this line of reasoning then the apparent democratic peace is seen to arise not so much from democracies being inherently culturally averse to war as from their being inherently cautious to avoid the cost of war. Their choice of adversary is then less about the potential adversary's internal political structure than about his susceptibility to being engaged asymmetrically.

The aversion of Western democracies to symmetric conflict results from the catastrophic costs of the – essentially symmetrical – First World War, after which emerged not only a political aversion to war, in principal, but also three broad military options for waging war without such devastating cost: blitzkrieg (seeking an asymmetric advantage in offensive force and speed), the *Maginot* doctrine (seeking an asymmetric defensive superiority) or strategic air offensive (seeking to attack not the enemy's strength but his weak and vulnerable areas: supply lines, economic targets, the industrial work-force and thus the people's will).⁹ A *blitzkrieg* strategy requires well-organised and trained troops with the most modern equipment and normally relies on a considerable element of surprise or shock for its success. Münkler¹⁰ points to the *Wehrmacht*'s rapid move through France in the early part of World War Two, the Israeli army in the Six Day War and the US-led coalition's attack into Iraq in the 1991 Gulf War as examples of relative success using this strategy, though in all cases failing to result in lasting political gains. At time of writing (early 2007) it looks like a similar judgement must be made of the 2003 US-led invasion of Iraq, also. A drawback of this option is the expense required in preparation of suitable forces for its execution. The alternative of a *Maginot* strategy has largely been discredited by the experience of France in the Second World War; there is simply too great a vulnerability created by

ceding initiative to the enemy. Western strategy since the Second World War, then, whether in its response to the Cold War threat – Massive Retaliation – or in more recent wars of intervention, has tended to favour the third option. This has important implications for *jus in bello*.

The relevant trends in the West's preferred way of using force are, then, largely driven by risk and casualty (and perhaps cost) aversion. This has led to a reliance on technology – taking to the logical conclusion a strand of progress that has existed throughout the history of warfare: the development of weapons whose range (predominantly) allows you to engage your enemy before he is able to engage you. For, as JFC Fuller wrote as long ago as 1941, discerning it as a 'constant tactical factor': 'Every improvement in weapon power, means of movement and protection has aimed at lessening terror and danger on one the side by increasing them on the other.'¹¹ Today, this reliance on technology has brought with it a tendency to try to remove to the greatest extent possible our own soldiers from the battlefield. In doing so it also removes from the battlefield the moral agent; the arbiter of proper and improper conduct; the only agent for compassion and humanity.

A further, unintended, consequence of the drive to 'sanitise' war, is that it may have made war more likely. If democracies are, as the Democratic Peace theory supposes, averse to war because of its cost, then as its costs reduce then they may be more inclined to use it as an instrument of policy. In other words the (all too often illusory) concept of 'clean' war, may make it an altogether more palatable policy option for Western politicians. For example, Michael Byers argues that:

(A)fter decades of massive defence spending, the United States is assured of victory in any war it chooses to fight. High-tech weaponry has reduced the dangers to US personnel, making it easier to sell to domestic constituencies. As a result, some US politicians had begun – at least until the quagmire in Iraq – to view armed conflict as an attractive foreign policy option in times of domestic scandal or economic decline, rather than the high-risk recourse of last resort. This change in thinking has led to a more cavalier approach to the *jus ad bellum*, as exemplified by the Bush Doctrine of pre-emptive self-defence, and is beginning to have a similar effect on the *jus in bello*.¹²

Experience in Kosovo, Iraq and Afghanistan suggests that however we might minimise our own casualties, use of force is seldom ‘clean’ for all sides and an issue we must consider is the extent to which our chosen methods transfer risk not only to the enemy (which in war, is fair enough) but to the innocent civilian population.

A feature of modern professional armies in the West today is the clear articulation of an ethos that encapsulates a code of conduct, with roots in much older concepts, that may be termed ‘warriors’ honour’. Aspects of the sort of conflict being faced today may present that with some challenges. In the context of how the West wages war there is a rapidly developing trend towards ‘outsourcing’ swathes of military capability to the private sector, with a consequent growth in the number and role of PMCs. This is not free from moral consequence, in particular, it will be argued, in that it adds to the battlefield protagonists who may not be party to the warrior code, or share with professional soldiers the same imperative for *jus in bello*.

4.2.1 Risk/Casualty/Cost Aversion

Minimising the costs associated with conflict – lives, treasure and political capital – is a natural and proper function for any government considering commitment of military forces. However, it is also important that the moral consequences of a decision not to invest any of these things, or to invest too little, is understood and included in the investment cost-benefit analysis. In particular a decision to commit to conflict must be accompanied by an understanding of the inevitability of casualties.

Casualty-aversion has been identified as a characteristic of the Western approach to war particularly in the two decades since the end of the Cold War, though as a phenomenon especially associated with the US military it is often attributed to a political and military leadership shaped by the experience of Vietnam. This aversion is perhaps more fairly seen not as reluctance to accept the inevitability of casualties at all but rather as a reaction to what was seen as needless waste. Charles Dunlap, for example, suggests that ‘(s)ome of the impetus for casualty aversion arises from within the armed forces and originates in the military’s Vietnam legacy. Many in uniform believe that lives

were needlessly lost in the war in Southeast Asia and are determined to avoid putting military personnel at risk unless absolutely necessary.’¹³

This can in part also be seen as a reaction against a method of waging war through a ‘strategy of grinding attrition’¹⁴ which is oftentimes associated with ‘The American Way of War.’¹⁵ That is to say a strategy of victory through overwhelming numbers used without great skill and with heavy cost in casualties to both sides; the winner simply being the side most able to withstand such loss. Boot ascribes such strategy to Grant in the US Civil War, to the US in both World Wars and, with less success, in Korea and Vietnam, ‘the former being a costly draw, the latter a bloody failure.’¹⁶ Although Boot goes on to suggest that the first Gulf War followed a similarly attritional style, we can also draw many distinctions that demonstrate a determination to avoid heavy own-force casualties. The first Gulf War was indeed as much, if not more, attritional than it was manoeuvrist,¹⁷ but it demonstrated attrition at a distance: the use of an overwhelming technical superiority to ensure that ground troops were only committed when certain of relatively bloodless success.

The so-called Weinberger-Powell Doctrine¹⁸ (see p203) can also be seen as a reaction to the losses sustained in Vietnam, and more recent US military doctrine formulations articulate clearly a perceived need to avoid US casualties. *Joint Vision 2010* insists that

(t)he American People will continue to expect us to win any engagement, but they will expect us to be more efficient in protecting lives and resources while accomplishing the mission successfully. Commanders will be expected to reduce the costs and adverse effects of military operations, from environmental disruption in training to collateral damage in combat. Risks and expenditures will be even more closely scrutinized than they are at present.¹⁹

A slightly more sanguine understanding of likely future conflict is offered by the reappraisal articulated in *Joint Vision 2020*:

....the joint force will fulfil its primary purpose – victory in war, as well as achieving success across the full range of operations, but it does not mean that we will win without cost or difficulty. Conflict results in casualties despite our best efforts to minimize them We will win – but we should not expect war in the future to be either easy or bloodless.²⁰

The issue might, then, be seen as one of cost-benefit analysis: casualties will be accepted in proportion to the issue at stake. This is the tack taken by the UK's (2000)

Future Strategic Context for Defence:

Casualties to our own force will only be acceptable to public opinion if they are seen to be proportionate to what is at stake in the campaign. The critical factor will be the extent to which the public feels the UK national interest is engaged or the scale of the wrong to be righted. The degree of public aversion to casualties can be expected to vary between members of an alliance and this may have an impact on operational planning.²¹

Similarly, Charles Hyde²² has argued that the American public is far more sophisticated in its cost-benefit analysis than it is popularly given credit for. As evidence he cites research by the Triangle Institute for Strategic Studies²³ (see p137). This suggests two things: firstly, perhaps unsurprisingly, acceptance of casualties is proportionate to perceived national interest. Secondly, and unexpectedly, that of three constituencies – the mass public, the US political leadership and the US military leadership – it is the senior military figures who are most casualty averse, closely followed by the political elite. The mass public – at least in answers to a survey examining hypothetical situations – showed a significantly greater tolerance of casualties.

With this sort of evidence and more recently the empirical evidence of US public acceptance of the casualties from Iraq – though this is becoming more fragile as time goes by – some are questioning whether the West – and the US in particular – really is as casualty averse as it was characterised throughout the 1990s. At a TISS-sponsored Strategy and Policy Planning workshop in 2005, an expert panel on Casualty Aversion tentatively concluded that 'the whole notion of American casualty phobia was probably based as much in myth as in fact.'²⁴ However, one of its members, Albert Pearce had earlier argued that casualty aversion was 'the Achilles heel' of US humanitarian intervention policy²⁵; that disproportionate concern for own-force casualties undermined the US's ability to conduct effective humanitarian interventions.

The change – whether in actuality or perception is accounted for by Colin Gray:

Because the 1990s presented the United States with highly discretionary conflicts, theorists were able to propagate two plausible fallacies in particular.

The first was the partial nonsense of an alleged American aversion to casualties. The second was the myth that we had entered an era of post-heroic warfare. A greater sensitivity to American history, as well as some empirical research on attitudes, past and present, should have promptly shot these myths down in flames. American society has always been casualty-averse when either it does not care about the issues in dispute or it realizes that Washington is not seriously seeking decisive victory.²⁶

The key phrase is ‘discretionary conflicts’ – those conflicts entered into, usually from a sense of moral obligation, in order to effect humanitarian aims, rather than out of the necessity to defend vital national interests. This would accord with the TISS findings and is also supported by growing US public disillusionment with the conflict in Iraq as casualties grow and the linkage with US national security, so played-upon by the Bush Administration in 2003, is increasingly difficult for the US public to perceive. A *Washington Post/ABC News* poll in mid-2005 found 75% of respondents thought the casualties unacceptable and 60% believed the war not worth fighting.²⁷ In fact such disillusionment began to set-in very quickly after the end of the war proper (President Bush’s ‘Decisive Combat Operations’), as the prospect of reaching a quick satisfactory conclusion receded and that of a protracted counter-insurgency campaign increased.²⁸ Rising casualties, a lack of obvious progress and a growing feeling that US interest was no longer being served by involvement in Iraq, made the conflict an election issue for the US, being a key factor in the Republicans’ loss of control of both the Senate and the House of Representatives in the 2006 mid-term elections.²⁹

General Sir Rupert Smith also, in his analysis of the developing characteristics of contemporary conflict³⁰, identifies trends which help explain this aspect of the Western approach to war. Of the six inter-related trends that Smith articulates, two are especially relevant here: firstly, because in modern conflict the result is not determined decisively by force of arms, such conflicts are generally unbounded by time – rather they have the capacity to be enduring; secondly – and closely related – protecting the force has taken on a much greater importance than it had in industrial-age warfare. Western nations have (nearly all) abandoned conscription and it is difficult to see how they could ever return to it except in circumstances of (publicly recognised) gravest emergency. Western inventories of key capital equipment such as warships, military aircraft, tanks and armoured vehicles are at an all-time low and the industrial capacity for producing

replacements, even in the United States, is very small indeed. Thus, in both manpower and materiel terms, the force must be protected. The situation is analogous to the nineteenth/early-twentieth maritime doctrine of the 'fleet in being' that dictated avoidance of decisive engagement if at all possible. This resonates, too, with Münkler's argument that contemporary conflict has similarities with pre-Westphalian wars when the value of the feudal army militated against its exposure to direct engagement with the enemy and therefore rendered preferable attacks upon the civilian populace, crops and land.

So, even if a good case can be made that casualty aversion is in inverse proportion to national interest, it is still, understandably, an influence on policy and especially so in those conflicts deemed 'discretionary'. Nor is this solely a US phenomena; it has played a key role in the decisions of several NATO members as to whether they will commit troops to conflicts and, having done so, what roles their troops may undertake. A clear example is afforded by NATO's operation in Afghanistan where, in 2007, insufficient troops could be found to meet the requirement of operations in the dangerous Southern Region; even those NATO nations who were contributing to the mission, refused to allow their redeployment to support the UK/Canadian (and to a very small extent Dutch) forces operating in Kandahar and Helmand.³¹

What, then, is the potential impact on *jus in bello*? Firstly, it affects willingness to intervene at all or restricts intervention to non-military and often non-decisive means. Secondly it enhances a perception of selective intervention that in turn undermines claims to moral universality. Thirdly it can lead to conduct of operations that transfers risk to the population at large – often those whose 'rescue' is providing the *jus ad bellum* for the intervention in the first place. Fourthly, it can result in an inadequate commitment of manpower that in turn impacts on the conduct of operations. Finally, it can lead to premature withdrawal from an intervention which may leave the situation worse than had no intervention occurred. Evidence of all of these can be found in Western interventions since the end of the Cold War.

4.2.1.1 The Impact of Casualty/Risk/Cost Aversion: Reluctance to Intervene

Reluctance to intervene is primarily an issue of *jus ad bellum*. However, as has been frequently noted, *jus ad* and *jus in* are inter-related. Our reluctance to intervene militarily can shape our conduct in a crisis – dictating a response short of decisive intervention, for example, which may have moral consequences. Just war doctrine requires, of course, that military force be a last resort. Nevertheless, a case can easily be made that there have been occasions on which a much better outcome might have been reached by an earlier or more whole-hearted resort to use of force (or indeed any such resort at all). It is equally easy to make a case that in many such cases it has been concern for the risks – in lives, treasure or political capital – that have deterred military action. De Wijk³² identifies three instruments of coercion that can be used: political, economic and military. However, he notes³³ that the political instrument – demarches, withdrawal of ambassadors, UN resolutions *et cetera* – have little effect on regimes careless of international opinion and may even be used by such regimes as evidence, to their own populations, of an external threat, in order to rally popular support or even to justify internal repression. Economic sanctions can be used in a similar way. Moreover, they can have harsh consequences for the ordinary population. De Wijk points to the empirical evidence gathered in a study by Hufbauer, Scott and Elliot³⁴, which considered 115 cases of economic sanctions from 1914 to 1990 and concluded that only 40% were successful. This is because states can find alternatives (as Iraq did throughout the period of UN sanctions from 1991-2003), can point to the sanctions as evidence of external threat, and because multi-lateral action suffers from states' different interest in ensuring effectiveness (again, witness Iraq and divisions over sanctions even among EU states). Iraq also offers evidence for the argument that it is the ordinary people who suffer most from a strong sanctions regime, contra the just war criterion of discrimination and arguably that of proportionality too. Her health service, for example, once on a par with those of major European powers, was devastated by the long period of sanctions (or at least by the Baghdad regime's manipulations of them).³⁵

The tardiness and then the nature of European nations' reaction to the 1990s crises in the Balkans stands as further evidence of the moral consequences of a reluctance to

intervene and was certainly, in part at least, a result of an unwillingness to suffer casualties. As the Balkan situation deteriorated and European nations, especially, became more and more militarily involved, politicians and newspapers were all too quick to repeat Bismark's adage 'The Balkans are not worth the bones of a single Pomeranian grenadier'³⁶. In the UK there was widespread concern expressed in the media when the British Army suffered its first casualty in Bosnia, LCpl Wayne Edwards. Brendan Simms highlights casualty aversion as being among the policy drivers that delayed effective UK intervention in the Balkans.³⁷

It must be recognised, too, that potential adversaries and the perpetrators of human rights abuses are highly likely to exploit any perceived risk/casualty/cost aversion in order to deter Western intervention. Perhaps the most striking example of this in actuality was the response of those opposed to the UN-brokered agreement, in 1993, for the return to power of Haitian President Aristide who had been ousted by a military coup. As part of the Governor's Island Agreement, the US and Canada were to deploy supporting troops, principally engineers and logistics specialists. On 11 October 1993, just eight days after the so-called 'Black Hawk Down' incident in Mogadishu, Somalia (see p272 below), the contingent approached Port Au Prince aboard the *USS Harlan County*. They were greeted by opponents of the agreement who '...waved placards and shouted threats at the US ship. They were hooligans who undoubtedly would have dispersed at the first sign of the well-armed troops. But among their slogans was one in particular: "We are going to turn this into another Somalia."'³⁸ In Washington news of this reception resulted in panic and, without consultation with the UN, an order for the *Harlan County* to withdraw immediately. As a result the Governor's Island Agreement collapsed.

4.2.1.2 The Impact of Casualty/Risk/Cost Aversion: Selective Intervention

Selective intervention is another area of *jus ad/jus in* overlap. It was argued in Chapter 3 that the inability to intervene everywhere did not of itself deny the right – or obligation – to intervene anywhere. Nevertheless, humanitarian intervention based on claims of moral universality can lose its moral authority when our willingness to

intervene appears far more related to national interests. Selectivity of Western intervention has heightened cynicism, especially in the developing world, towards claims of humanitarian necessity as justification for those interventions which the West does choose to undertake. For the US such selectivity was firmly enshrined in PDD 25³⁹, another consequence of the Mogadishu incident (see p272 below), which sought to re-establish national interest as the primary determinant of engagement in peacekeeping operations/humanitarian interventions.

It has been an enduring difficulty for UN peacekeeping missions that the necessary means are rarely made available to meet the mandate. Moreover it has been a long-standing criticism of the West, and especially the P5, that whilst they have the major say in authorising military action by the UN, they do not significantly shoulder the military burden. In 2000 a Bangladeshi proposal went so far as to suggest that P5 membership should be linked to a commitment to provide forces.⁴⁰ The situation then was that only one 'Western' nation – Australia – appeared in the top ten listing of troop contributing nations (see Table 4-1) and then only because of her commitment to a major UN operation – that in East Timor – very much in her own area of interest.

Nation	Total Troop Contribution to UN Operations
India	4507
Nigeria	3439
Jordan	3400
Bangladesh	2362
Ghana	1906
Australia	1710
Pakistan	1209
Kenya	1197
Poland	1077
Nepal	1037

Table 4-1: Top Ten Troop Contributing Nations to UN Operations in 2000⁴¹

The P5 response to the Bangladeshi proposal was unanimous: whilst they would continue to contribute a larger proportion of the costs of UN interventions and were

willing to provide equipment support to others, they would not find the additional necessary troops. Africa, more than any other region has suffered from this lack of Western readiness to commit. William Shawcross, highlights the particularly stark example of Rwanda:

The best recent example of the limits of non-violent humanitarian intervention in stopping mass killing is the Rwandan genocide: the only realistic mean of halting the genocide was military intervention but the refusal of Western states to risk their soldiers to save strangers resulted in a million Rwandans being killed.⁴²

Thalif Deen continues his criticism of the P5 thus: ‘The five permanent members, along with most Western nations, are keeping away from most peacekeeping missions primarily because they do not want their soldiers to return home in body bags. “Spilling Third World blood is okay. But spilling P-5 blood is obviously a No-No”, says a Third World diplomat.’⁴³

Sierra Leone offers an example of more mixed Western engagement and, indeed, stands as an example of just how successful a determined Western intervention can be. A UN mission – UN Mission in Sierra Leone (UNAMSIL) – was established in October 1999 to monitor and assist in implementation of the Lome Peace Agreement between the Sierra Leone government and Foday Sankoh’s rebel Revolutionary United Front (RUF).⁴⁴ The international community was slow to meet the UN’s call for troops and in April 2000, as the Lome Agreement began to unravel, UNAMSIL was significantly below its mandated strength. Moreover, as has all too often been the case with UN missions, the quality of those troops which had been provided was generally poor and the force inadequately equipped. UNAMSIL had suffered several defeats in confrontation with the RUF and their morale was low. The RUF was growing stronger and taking advantage of weapons and equipment, including armoured personnel carriers, captured from UNAMSIL. In May 2000, with the capital, Freetown, on the verge of being overrun, the UK launched an intervention, initially with a limited non-combatant evacuation (NEO) objective to ensure the safety of British nationals. This small but effective military force, used decisively, re-established the authority of the government and forced the rebels to all but give up the fight.⁴⁵ Yet later the same year, despite the UK’s continued involvement, the UN mission was again endangered by the

failure of other nations to offer troops to replace those being withdrawn by India and Jordan. Jordan's withdrawal was largely a response to the refusal of Western nations to participate.

By March 2007 the overall situation was marginally better with a P5 Nation, France, in the top ten alongside Italy (see Table 4-2). The West can also point to UN-authorised but not managed operations such as NATO and later EU peacekeeping in the Balkans and, of course, many are making enduring contributions to operations in Iraq and Afghanistan. The latter can fairly be argued to be an international operation – indeed it has UN authority – aimed at maintaining peace and security. (The former is, of course, rather more problematic in this regard). Nevertheless, and as Darfur continues to exemplify, there is a marked Western reluctance to commit to operations in Africa.

Nation	Total Troop* Contribution to UN Operations
Pakistan	10,173
Bangladesh	9675
India	9471
Nepal	3626
Jordan	3564
Ghana	2907
Uruguay	2583
Italy	2539
Nigeria	2465
France	1975

Table 4-2: Top Ten Troop Contributing Nations to UN Operations in March 2007⁴⁶

Whether Western aversion is really to casualties per se (and the robustness of some in respect of operations in Iraq and Afghanistan, throws this into doubt) or whether it is a wider aversion to risk and cost, such aversion is understandable, even proper for any government. However, it is important that the moral consequences are understood: applying selectivity to intervention on risk/cost grounds undermines claims of moral universalism as a justification for those interventions that are undertaken.

* Includes civilian police.

4.2.1.3 The Impact of Casualty/Risk/Cost Aversion: The Conduct of Operations and Risk Transference

Consideration must now be made of how a fully understandable desire to reduce risks and costs to our own side impacts, with moral consequences, on how operations are conducted. Limited mandates, inadequate numbers, and a heavy focus on ‘force protection’ – safeguarding the lives of the interveners – have had impact on recent operations in the Balkans, in Iraq and in Afghanistan, with clear (in hindsight) consequences for our traditional understanding of *jus in bello*. In examining and highlighting some of these issues, the contention is not that preserving lives of our own forces is wrong; of course it is not. However, we must be aware that when the conduct of operations is affected by a failure to commit the necessary resources, or when our perfectly understandable casualty-aversion transfers risk to non-combatants, then there is a moral consequence; we risk breaching the tenets of *jus in bello* and this may also impact on our *jus ad bellum*. Michael Walzer tells us that the two strands of just war doctrine are ‘logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in accordance with the rules.’⁴⁷ They cannot, however, be entirely decoupled. If, for example our *jus ad bellum* is predicated on humanitarian rescue – as was the case in Kosovo in 1999 – but our conduct places those who we seek to rescue in greater danger – then our justification looks hollow. For, as Paul Cornish and Francis Harbour argue:

Clearly there is a paradox in killing and injuring some people and ruining their livelihood in order to protect their human rights or the rights of others. Under these circumstances *jus ad bellum* cannot be a once-and-for-all evaluation, but an iterative process intimately connected to considerations of *jus in bello*-side proportionality as well as discrimination.⁴⁸

The two strands, then, should be seen as ‘separable but not separate.linked in a mutually dependent relationship which requires each to inform (though not to overwhelm) the other.’⁴⁹

The 1993 ‘Black Hawk Down’ incident in Mogadishu, to which we shall return (see below, p272), provides an earlier and perhaps even starker example than that of Kosovo

of what can be termed risk transference; transference, that is, not to the enemy but to the neutral population. The impact of the death of the eighteen US servicemen is examined later. What is less well documented and considered is the number of casualties amongst the Somalis (both those actively opposing the Americans and, probably in much greater numbers still, those simply caught up in the fighting. James Mayall and Ioan Lewis allege that after the attack on Pakistani peacekeepers that was the precursor to the incident, ‘Admiral Howe’s (US) forces reacted with injudicious force causing very considerable Somali casualties – not necessarily all supporters of Aideed.’⁵⁰ Former UN Secretary General Boutros Boutros-Ghali describes the follow-on incident thus: ‘As the Delta Force moved to protect the downed airmen, they were surrounded by hundreds of Somali men, women and children. Trapped, the US force poured devastating firepower into the Somali crowds, killing, by later press investigations, as many as a thousand Africans.’⁵¹ Some critics of the action place the figure for Somali dead even higher, indeed as high as 6000-8000.⁵²

US Intervention in the Balkans (UN-mandated and initially a UN-, later a NATO-led force) offers plenty of examples where conduct of the operation was adversely affected by risk-aversion. Initially it was a significant factor in many countries’ (and most notably the US’s) unwillingness to commit troops on the ground. The Bismark adage referred to above (see p262) was widely repeated by political and military commentators. When NATO’s Implementation Force (IFOR) (later Stabilisation Force – SFOR) took over from UNPROFOR following the Dayton agreement, it had a more robust mandate than that which had limited UNPROFOR’s effectiveness. Nevertheless some observers detected unwillingness by some contingents fully to utilise their mandate, primarily, it was alleged, through concern for their own safety. For example, in 2000, five years after Dayton was signed, *The Times* reported continued concern even among US officials that it was casualty aversion that prevented SFOR from arresting former Bosnian Serb President Radovan Karodid, who had been indicted in the Hague:

... American observers claim that fears of losing a US soldier in combat will render them incapable of taking on the mission. “It’s not a question of courage, it’s a political decision in Washington that there should be no American deaths in Bosnia,” one American official,, said.

Western officials doubt US troops will be ordered to act, because of the so-called “Somalia syndrome” that stemmed from the death of 18 soldiers in Mogadishu in 1993.

The watchword of American troops in the NATO-led Stabilisation Force is “force protection” – a focus on avoiding casualties.⁵³

The same article accused French troops, stationed around Visegrad for five years, of routinely ignoring opportunities to arrest indicted war criminals.

In 1999 when NATO took action to end Serb oppression of the ethnically-Albanian majority population in the Serbian province of Kosovo, the preference for an air campaign over the insertion of land forces was widely blamed on casualty aversion. The preference for an air campaign allowed the Serbs to accelerate a ruthless campaign of ethnic cleansing leading to a major refugee crisis in neighbouring Macedonia – for which NATO was ill-prepared – and subsequently left NATO forces on the ground too few to effectively control the border. It also raised questions over the proportionality and discrimination in NATO’s attacks. Although recommending that there were insufficient grounds for the Office of the Prosecutor to investigate further, the International Criminal Tribunal for Yugoslavia (ICTY) committee of investigation was less than whole-hearted in clearing NATO’s actions.⁵⁴

Nicholas Wheeler is less ambiguous in his criticism, arguing that the choice of strategy, necessary to secure alliance unity in the face of casualty predictions for a land campaign, put at risk the declared objective of the campaign:

... the character of the means employed by NATO undermined the humanitarian ends of the intervention. Far from preventing a humanitarian catastrophe – the stated aim of the intervention – NATO’s action led to an acceleration of Serb ethnic cleansing, leading to the deaths of several thousand Kosovar Albanians. By targeting a range of civilian facilities that were claimed to constitute legitimate military targets, such as oil refineries, bridges and electricity generating plants, the bombing produced civilian casualties among the Serbs. Given the low risk run by NATO air-crews, and the failure of the air campaign to stop the ethnic cleansing by Serb army and police forces, the unsettling conclusion can be drawn that NATO’s desire to undertake casualty-free intervention was achieved at the expense of inflicting great suffering on Kosovar Albanians and Serb civilians.⁵⁵

With the campaign ‘won’ (i.e. Serbia having agreed to de-facto NATO control of Kosovo), continued over-caution and under-manning prevented effective control of the

movement of Albanian-rebels across the Kosovo-Macedonia border that was a significant factor in the dangerous instability and crisis that hit Macedonia in early 2001. In the Spring of 2001 a more robust approach by the US highlighted earlier failure:

After nearly two years in which self-protection has been their main preoccupation, American soldiers have at last begun foot patrols along the south-east border which they are supposed to secure.

All the signs are that they have left it far too late. From the American base mortar fire can be heard rolling of the walls of the neighbouring valley. It is the sound of fighting between Macedonian troops and ethnic Albanian rebels, who until recently moved almost at will across the frontier from Kosovo to establish bases from which to launch a guerrilla campaign in Macedonia.

The American rules of engagement mean that even now the rebels have little to fear. ... (T)he soldiers have no mandate to use force. Only when fired on do they have the right to fire back.

Critics say the Americans' un confrontational instincts are shared by all 37, 000 NATO-led troops in Kosovo. No one has shown much appetite to take on the gun culture that after 21 months of relative peace still lurks below the surface of Kosovo society.⁵⁶

Policing the UN-mandated no-fly zones in Iraq suffered similarly according to some:

American military commanders have recommended reducing patrols of the "no-fly" zones over Iraq because of an increasing risk that they may be shot down.

Army General Tommy Franks and Air Force General Joseph Ralston expressed concern about escalating Iraqi attempts to shoot down British and US aircraft, Pentagon officials said yesterday.⁵⁷

Indeed, some have argued that it was concern over the prospect of casualties being taken in implementing the no-fly zones that both rendered ineffective the Clinton Administration's policy of containing Saddam's regime and, thereby, led to the Bush Administration's determination to take decisive military action to remove the regime entirely.⁵⁸ Thomas Ricks' examination of the failure of US policy in Iraq also hints at this. Describing the 1998 DESERT FOX bombing and Cruise missile attacks on Iraq as 'the most intense enforcement of the containment policy that occurred in the entire twelve-year period between the 1991 war and the 2003 invasion',⁵⁹ Ricks notes that despite the military assessment of greater than expected impact on the Iraqi regime, critics of the containment policy – and those who saw the raids as an attempt to divert attention from the forthcoming impeachment proceedings against Clinton – were unconvinced. Danielle Pletka, of the American Enterprise Institute, argued: 'They were so casualty averse. They did nothing but bomb empty buildings.'⁶⁰ Similarly, Richard

Perle, later to be a leading architect of the 2003 invasion policy, claimed that ‘(t)he Clinton administration was totally risk averse. They allowed Saddam over eight years to grow in strength. He was far stronger at the end of Clinton’s tenure than at the beginning.’^{61*}

More recently still the conduct of the US-led interventions in Iraq and Afghanistan yield further examples of how risk-aversion and an unwillingness to commit sufficient troops on the ground (and at most risk) impacts on the conduct of operations, with undesirable moral consequences. The debate about US strategy in the 2003 invasion of Iraq, in particular Defense Secretary Rumsfeld’s over-ruling of military advice on the numbers of ground troops needed, and the inadequacy of plans for post-conflict control of the country will continue to rage. They are well documented elsewhere but we should just consider those aspects with direct relevance to this section. A later section will consider the implications on the possible over-reliance on and over-confidence in the efficacy of high-technology weapon systems. Of direct relevance here, though, is the argument advanced by some critics of the US-led operation that inadequate troop levels, especially post-conflict, contributed directly to the two most morally outrageous incidents of the war: the systematic abuse of detainees at Abu Ghraib prison and the massacre of civilians at Haditha. Thomas Ricks argues that both the lack of post-conflict governance planning and its poor implementation on the one hand, and the inadequate numbers of US (especially regular) troops played their part at Abu Ghraib:

Even within the military effort confusion reigned, especially in the ambiguous but crucial area where military operations supported the functions of the civilian occupation authority. Most crucially, the detention of prisoners was supposed to be an Iraqi function – but because there was no Iraqi government, it became the task of the CPA (Coalition Provisional Authority). And because the CPA lacked the personnel, resources, or inclination to handle the job, it had the military do it, even though military commanders didn’t report to the CPA. This was one reason the situation at the Abu Ghraib prison would get out of hand in the following months: No one was really in charge of overseeing it.⁶²

* In fact the considerable evidence gained from the 2003 invasion suggests that Perle’s assessment was widely inaccurate.

A similar view is taken by Philip Zimbardo^{*}, who argues convincingly that the results of his celebrated 1971 Stanford Prison Experiment⁶³, could have predicted the outcome at Abu Ghraib.⁶⁴ The crux of his argument is that such events are not simply a matter of ‘a few bad apples but of a rotten barrel’, that is to say that it is situational factors rather than individual psychological ones that lead to such outcomes. He notes, for instance, that the soldiers found culpable at Abu Ghraib were not regulars but reservists and thus were less thoroughly imbued in military ethos; their units were undermanned, individuals were working long shifts with little rest in between, and they were living in grossly unpleasant conditions. Thus the decision to employ inadequate numbers of soldiers – whether out of cost-, risk- or casualty-aversion – was a significant factor in the gross immorality at Abu Ghraib. The official US report into detainee abuses, *The Schlesinger Report*,⁶⁵ arrives at conclusions that would also support this view.

Similar arguments about situational factors have been advanced to explain the massacre by US Marines at Haditha in November 2005. Originally claimed to be victims of the same road-side bomb that killed a marine, the 24 civilians (including 11 women and children) were later described by US official reports as accidental victims of the ensuing fire-fight with insurgents. Subsequently, however, evidence emerged that they may have been entirely innocent victims of an indiscriminate shooting spree by the highly-charged marines following the attack that had killed their colleague. Several US Marines have now been charged with murder. Don MacCuish of the US Air University contends that, as with Abu Ghraib, Haditha resulted from institutional rather than simply individual failures, not least the failure to deploy sufficient troops properly to deal with the level of insurgency being encountered. He points out that ‘the unit was on its third deployment to Iraq in 2½ years and during its previous deployment, seven months prior to the November incident, the company was one of the lead Marine units in the Battle of Falluja at which time 30 members of the battalion were killed.’⁶⁶ Moreover, whilst not directly relevant to the argument of this section, he points to descriptions in a BBC report of the marines’ living conditions in the ‘decaying rabbit warren of Haditha Dam’ as being ‘feral’.⁶⁷ Again, as with Abu Ghraib, too few troops,

^{*}In addition to the relevance of his Stanford Prison Experiment, Zimbardo was an expert witness for Specialist Charles Graner who was sentenced to 10 years in prison for his part in the Abu Ghraib abuses.

too thinly spread and in living conditions partly dictated by ‘force protection’ concerns, created conditions in which a significant immorality was committed.

Finally, it has been a repeated observation from both the US and UK experiences in Iraq and Afghanistan that the nature of the attacks being faced and the political imperative for casualty avoidance in an unpopular war (particularly the case in Iraq), has led to the adoption of a force protection stance that impacts operational effectiveness, indeed is often counter-productive, in counter-insurgency. In the words of one US commander: ‘Coalition forces are forced to interact with the Iraqi populace from a defensive posture, effectively driving a wedge between the people and their protectors.’⁶⁸

4.2.1.4 The Impact of Casualty/Risk/Cost Aversion: Premature Withdrawal

The remaining issue to be considered in relation to casualty/risk and/or cost aversion is that of premature withdrawal. In such cases, experience suggests it is indeed casualty aversion that is the primary factor; governments commit to interventions understanding that they will be financially costly and there are no obvious examples of withdrawal based primarily on increasing costs. However, there are clear examples of an unanticipated body-count driving a change in policy. The longer-term impact of the so-called ‘Black Hawk Down’ incident in Mogadishu in 1993 has been referred to above (See p262). It is also a very stark example of the moral consequences of casualty/risk aversion undermining political will to the extent that an intervention is terminated with its mission incomplete. The incident had its genesis in the June 1993 attack on Pakistani peacekeepers serving with UNOSOM II in which 26 were killed and a further 56 wounded. Supporters of the warlord ‘General’ Aideed were blamed and UNSCR 837 was passed authorising:

all necessary measures against all those responsible for the armed attacks..... including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.⁶⁹

In the operations that followed four American servicemen were killed and six injured, leading to calls in Washington for the force to be withdrawn. However, the US

Administration reluctantly acceded instead to calls from the American commander of UNOSOM for an increase in force levels, including deployment of a Delta Force special operations unit. During a combined Delta Force/US Rangers operation intended to capture Aideed, two Black Hawk helicopters were shot down by Somalis using surface-to-air missiles. The ensuing rescue mission of the downed airmen left dead eighteen US soldiers, a Malaysian and a Moroccan (and as noted above a much higher but undetermined number of Somalis both innocent and not).

The result in Washington was a hardening of attitude of those in Congress already opposed to the intervention and pressuring the Administration to withdraw. A bill sponsored by Senator Robert Byrd, calling for a withdrawal of US troops by the following January, was only narrowly defeated and the pressure was sufficient to lead President Clinton to announce a full withdrawal by March. Furthermore, the incident further hardened congressional attitudes against the UN and rendered vain any hope of the US meeting its arrears to the Peacekeeping fund.

The following year a similar situation was to face Belgium with regard to its peacekeepers in Rwanda. In April a tense peace dissolved into fierce fighting. Hutu extremists turned first upon moderate Hutus including Prime Minister Agathe Uwilingiyimana who was murdered along with ten Belgian soldiers from UNAMIR who attempted to protect her. The Belgians were tortured before death and their bodies subsequently mutilated, adding to the sense of outrage in Belgium.⁷⁰ Notwithstanding the impassioned pleas from UN Secretary General Boutros-Ghali, the Belgian government decided instantly on a complete withdrawal of their troops:

Belgium was inflicted with “the American Syndrome”: pull out at the first encounter with serious trouble. I argued against a Belgian pull out, but if they were determined to leave, I asked that they at least leave their heavy weapons behind so that they could be used by the remaining UN troops, which otherwise would be in a very weakened position. ...But the Belgian troops took all their arms with them as they went....⁷¹

The Belgian withdrawal, much as the Secretary General had feared and warned, led, effectively, to the collapse of the mission:

Caution ruled. With the important exception of Ghana, governments ordered their troops to protect themselves first of all, even if that meant standing by and

watching as lightly armed drunken thugs hacked women and children to death
....
....within a week of the genocide, 1,500 well-trained French, Italian and Belgian troops, with several hundred US Marines standing by in Burundi, flew into Kigali to evacuate expatriates and a few Rwandans, then left again at once.⁷²

Neither the United States nor any other power with the capability to intervene effectively in Rwanda, was prepared to do so. The lack of political will to shoulder the challenges, costs and risks associated with intervention in Rwanda, are well described – together with the disastrous consequences of such lack of will – by the UN mission’s commander, Lt Gen Romeo Dallaire in his harrowing book, *Shake Hands with the Devil; the Failure of Humanity in Rwanda*. This, for example from the introduction:

What I have come to realize as the root of it all, however, is the fundamental indifference of the world community to the plight of seven to eight million black Africans in a tiny community that had no strategic or resource value to any world power. An overpopulated little country that turned in on itself and destroyed its own people, as the world watched and yet could not manage to find the political will to intervene.⁷³

At the time of writing (mid- 2007) two things are becoming clear: that when it comes to a war where national interests are seen to be at stake (rightly or wrongly) the United States having once stood accused of casualty aversion, has considerable tolerance to losses; and that that tolerance is now running out. With both houses of Congress in Democrat control, considerable pressure is being placed on the Administration to begin a withdrawal from Iraq. Should that lead to an exit-strategy that leaves Iraq in worse circumstances than those prevailing *ante-bellum*, then the *jus ad bellum*, already widely criticised, will look emptier still. For as the position of then Secretary of State Colin Powell was paraphrased by an aide (quoting an oft used notice in US shops) ‘if you break it; you own it!’⁷⁴

Whilst the desire to minimise the losses (and costs) to ones own side in conflict is entirely natural and indeed desirable, there must remain a concern that this can lead to disproportionate and even indiscriminate losses on the other side or to the civilian population and that such breach of *jus in bello* tenets can, especially in humanitarian interventions, also undermine the stated *jus ad bellum*. In general war between two or

more nations the term ‘enemy non-combatants’ may have acceptable currency; in humanitarian interventions and, as will be argued later, in modern ‘asymmetric’* wars it has no real value; indeed it is morally dangerous. Our proper desire to minimise our own casualties ought not to be allowed to transfer the risk to the civilian population or even to engage the enemy in a way that is either disproportionate or indiscriminate.

4.2.2 Technology

As we have already seen (see p255) JFC Fuller regarded the perpetual search for a technological advantage over one’s enemy to be so fundamental to the history of warfare that he termed it a ‘universal tactical constant’. He cites a character from Balzac’s *Contes Drôlatiques*, one Captain Cochegrue, of whom it is said ‘*“les grosses batailles, il taschoyt de donner des horion sans en recevoir, ce qui est et sera toujours le seul problems a resouldre en guerre.”*’ (In great battles, he endeavoured to give blows without receiving them, which is and always will be the sole problem in war.)⁷⁵ Whether through longer range, faster rate of fire, deeper penetrative capability or greater protection, armies seek weapons that allow them to inflict greater damage upon their enemies than they themselves receive. (Which is in part why the term ‘asymmetric’ to describe but one type of warfare is so unsatisfactory: all warfare seeks asymmetry.) What then should be the moral concerns if the west has found the holy grail of apparently unassailable technological superiority?

Firstly, there is an issue of *jus ad bellum*, namely that if policy makers are seduced by the notion of quick and relatively painless victory then they be more ready to resort to use of armed conflict. In assessing that military victory can be achieved with relatively little cost to ourselves, it is easy to overlook both that there will still be casualties on the other side – and most likely to non-combatants, whose protection might, ironically, also be the *causus belli* and underpinning of our *jus ad bellum* – and that military victory may not of itself lead to long term solution. In this respect, Michael Ignatieff ascribes to the Clinton Administration’s greater readiness to resort to force over Kosovo than it

* The term is used here in its popular sense; the value of such use will be questioned later.

had been over Bosnia not so much to a hardening of political will as to a belief that new weaponry reduced the political cost of war:

The accuracy of new airborne weapons systems lowered – or appeared to lower – the political costs of using them. Clinton went to war, believing that new technology would bring speedy, risk-free victory. At the beginning of his Presidency, Tomahawk missiles could take out discrete buildings. By April 1999, the missiles were sufficiently precise to strike the Serbian leader's very bedroom. Such weaponry appeared to offer America guilt-free war. That was the theory: in practice, there are never any silver bullets. Targets were missed and innocent civilians were killed, and even when they hit the targets, the weapons didn't finish the job.⁷⁶

On the *jus in bello* side, and very much connected to the first point, we have to consider the risk transfer that our technological advantage achieves: not just from us to the enemy but also to the civilian population. In complex emergencies involving non-state entities as principal protagonists, and in humanitarian interventions fought to protect an element of a civil population from oppression or violence at the hands of a legitimate or de facto government, the term 'enemy non-combatants' is meaningless. In such circumstances the doctrine of double effect is of doubtful legitimacy and issues of proportionality and discrimination must be subject to greater scrutiny. Yet a combination of technological capability and risk aversion tempt us into tactics that seriously call into question our *jus in bello*.

Next we must consider whether our technological advantage, coupled with doctrines of 'overwhelming superiority' (see p203) may have reached a stage whereby we can inflict slaughter rather than engage in combat. Exacerbating this issue is the tendency for technological capability to remove man from the decision making cycle and in doing so extract from the battlefield the moral agent and with him the capacity for compassion.

4.2.2.1 Risk Transference

The technological developments represented in airpower (both manned and unmanned), in particular, provide a seminal example of Fuller's 'universal tactical constant' and push risk transference as far as it has yet been achieved. Both its destructive power and

the relative advantage it gives whoever has mastery of it, is presaged by General Jan Smuts's words of 1917:

As far as can at present be foreseen, there is absolutely no limit to the scale of its future independent war use, and the day may not be far off when aerial operations with their devastation of enemy lands and destruction of industrial and populous centres on a vast scale may become one of the principal operations of war, to which the older forms of military and naval operations may become secondary and subservient.⁷⁷

Even in airpower's infancy there were critics who pointed to moral issues related to its potency and concerns over proportionality and discrimination. Particularly vehement among them, Field Marshal Haig, commanding the British Expeditionary Force, was concerned at the morality of strategic bombing and its potential impact on public opinion.⁷⁸ More recently, Group Captain Andrew Lambert has drawn attention to the asymmetry implicit in effective coercive use of air power: 'Effective coercion is ... not about fair fight. To be successful, a coercer needs to demonstrate his asymmetry, both of power and invulnerability, to force the perceptions that he has the initiative, and that the opponent is utterly defenceless.'⁷⁹ He cites Rommel's view that '... anyone who has to fight, even with the most modern weapons, against an enemy in complete control of the air fights like a savage against modern European troops, under the same handicap, and with the same chance of success.'⁸⁰ If control of the air hands us such advantage – an ability to strike without (unless the enemy has a matching air defence capability) being struck – then little wonder it should be such an attractive proposition to politicians and strategists alike. The 1991 Gulf War gave ample demonstration of just what could be achieved by modern air forces against an enemy with inadequate air defences, and how such use of air power could reduce risk to ground troops. Indeed, this was the genesis of a belief amongst some policy makers that air power alone could win wars.

However, the inherent vulnerabilities of manned aircraft have to be negated if this asymmetry is to be exploited, and the means of doing so – high altitude bombing or the use of unmanned systems such as ballistic missiles, bring with them a price in terms of discrimination and, possibly, proportionality. Just this concern was raised by the US Conference of Catholic Bishops in its 1993 paper *The Harvest of Justice is Sown in Peace*:

..... strategies calling for use of overwhelming and decisive force can raise issues of proportionality and discrimination. Strategies and tactics that lead to avoidable casualties are inconsistent with the underlying intention of the just-war tradition of limiting the destructiveness of armed conflict. Efforts to reduce the risk to a nation's own forces must be limited by careful judgments of military necessity so as not to neglect the rights of civilians and armed adversaries.

In light of the preeminent place of air power in today's military doctrine, more reflection is needed on how traditional ethical restraints should be applied to the use of air forces. For example, the targeting of civilian infrastructure, which afflicts ordinary citizens long after hostilities have ceased, can amount to making war on noncombatants rather than against opposing armies. Fifty years after Coventry, Dresden, Hamburg, Hiroshima and Nagasaki, ways must be found to apply standards of proportionality and noncombatant immunity in a meaningful way to air warfare.⁸¹

The use of air power against, primarily, the Serbs in the Bosnian conflict and again over Kosovo, proved to be in many ways just what the Bishops feared. In 1995 and again in 1999, NATO air power was used coercively in order to avoid exposure of ground troops. James Der Derian neatly summarises both the political attraction and the moral danger of the west's waging war by leveraging its technological advantage:

(The United States') diplomatic and military policies are increasingly based on technological and representational forms of discipline, deterrence, and compellence that could best be described as *virtuous war*. At the heart of virtuous war is the technical capability and ethical imperative to threaten and, if necessary, actualize violence from a distance – with no or minimal casualties.

.....virtuous wars promote a vision of bloodless, humanitarian, hygienic wars. We can rattle off casualty rates of prototypical virtuous conflicts like the Gulf war (270 Americans lost their lives – more than half through accidents), the Mogadishu raid (18 Americans killed), and the Kosovo air campaign (barring accidents, a remarkable zero casualty conflict for the NATO forces). Yet, in spite of valorous efforts by human rights organizations, most people would probably come up short on acceptable figures for the other side of the casualty list. Post-Vietnam, the United States has made many digital advances; public body counts of the enemy are not one of them.⁸² (original emphasis).

To Der Derian's concern over the enemy body-count must be added a rather greater concern over the civilian casualties, largely avoided by the desert-focussed nature of the 1991 Gulf war* but insufficiently so in the Kosovo air campaign and a matter for serious

* Even then there were high-profile incidents of attacks on military/governmental infrastructure that the Iraqis claimed had inflicted significant civilian casualties.

concern in both the 2003 Iraq war and NATO's ongoing counter-insurgency fight in Afghanistan.

The issue of risk-transference has perhaps never been better exemplified than by the tactics employed by the US and NATO in Afghanistan. Standard practice when ground forces have come under attack from insurgents has been to attempt to stand-off and call in CAS. This carries a much reduced risk to the ground forces than would close combat with the insurgents but also carries a much greater risk to civilians. The insurgents have been quick to exploit the propaganda opportunities this affords, highlighting and doubtless exaggerating civilian casualties and, indeed, deliberately using local civilians as a shield. So serious was the perception of the civilian casualties NATO/US forces were causing that by mid-2007, Afghan President Hamid Karzai publicly rebuked the Allies and wrote to NATO's theatre commander to demand a change in tactics. As an example of the sort of media reporting that preceded Karzai's letter, the following appeared in the UK's *Guardian* in mid-June 2007:

Recently in Sangin an estimated 21 civilians were killed by bombs dropped from Nato planes after US and British soldiers were ambushed. In the eastern city of Jalalabad in March, US soldiers shot dead 19 civilians in the aftermath of a bomb attack. And yesterday seven policemen were killed by "friendly fire" in an air strike in the eastern province of Nangarhar.

The Jalalabad shootings may yet be deemed a war crime, but civilian deaths are normally tragic accidents. Often outnumbered and outgunned by militia men, the immediate response of Nato troops is to call on overwhelming firepower delivered by artillery, helicopter gunships and jets. The troops aren't wicked, they're just keen on staying alive. But these weapons are blunt-edged and indiscriminate. The price of overwhelming firepower is the death of nearby civilians.⁸³

Whilst the insurgent claims of civilian casualties were almost certainly inflated, Karzai's letter to the Commander of ISAF included an analysis conducted by the Afghan National Directorate of Security. This assessed that in the five preceding months 169 civilians had been killed and 142 wounded as a result of NATO/US operations.⁸⁴

The issue was also addressed above (see Section 4.2.1.3) in considering how risk aversion could impact on conduct of operations. The result is that a reliance on

technology to achieve the long-sought goal of being able to strike at an enemy from a distance that denies/reduces his ability to hit back also, especially on a complex non-linear battlefield, reduces discrimination and increases the risk of disproportionate casualties among the non-combatant population.

4.2.2.2 Removing Moral Agency

If soldiers on the battlefield are the primary agent of violence in war, then, ironically, they have historically also been the primary agents of compassion and moral arbitration; delivering death and destruction one moment, dealing out succour to the wounded (of both sides) and assistance to the unwittingly involved civil population, the next. The history of warfare is littered with examples of this and the author would draw attention to just one personal favourite: on the battlefield at Fredricksburg, Virginia, stands a statue in memory of the ‘Angel of Marye’s Heights: Sergeant Richard Kirkland of the 2nd South Carolina Volunteers infantry regiment, who on the second day of this particularly bloody battle (December 1862) risked his own life to venture forward from the stone wall where his unit was positioned, to deliver water to the many wounded union soldiers who had lain unaided all night on the slopes to his front. The greater the distance placed between soldiers and their enemies, the fewer the opportunities for such acts of heroic compassion.

Moreover, as distance increases, so the opportunity for true discrimination is reduced. Walzer draws attention to the issue of shooting ‘naked soldiers’⁸⁵. Drawing on first-hand accounts of, among others, Robert Graves, Wilfred Owen and George Orwell, Walzer makes the argument that when enemy soldiers, through the circumstances in which they present themselves – naked and bathing, for example – are seen not as ‘enemies’ but as fellow human beings, then killing them becomes remarkably difficult and will often times be avoided. This is all the more the case if other options – taking them prisoner, for example – are available. The reluctance of soldiers to kill is a feature of research also by SLA Marshall⁸⁶ and latterly retired US Army Lieutenant Colonel Dave Grossman⁸⁷. As distance increases so the opportunities for such discrimination – between genuine threats and others who just happen to be on ‘the other side’ – are

clearly reduced. Long distance weapons fired by an operator who cannot see the target can make no distinctions or, indeed, moral judgements.

What we might reasonably term 'moral distance' is also introduced and increased along with physical distance: if what we shoot at are 'targets' not people, then the moral judgements we make about them are coloured accordingly. The less an 'enemy' is seen as a person and the more as inanimate or non-sentient entity, the easier he is to terminate. Indeed, recognition of this simple psychological fact has always played a part in the internal propaganda of armies: an attempt to dehumanise the enemy thus overcoming the reluctance, to which Marshall and Grossman point, to kill. It may also explain a tendency for warfare to be the more brutal when it is fought across racial/ethnic divides.

The enclosed CD contains two short video clips, both readily available from the internet and widely circulated throughout 2003. Video Clip 1 appears to be from the gunner's station of an AC130 Gunship over Afghanistan. Video Clip 2 appears to be from the cockpit of an attack helicopter operating over Iraq. The legitimacy of the targets (at least initially) is not in question. In the first clip the efforts at discrimination – to avoid hitting the mosque, for example, are also clear. Nevertheless, in both cases, the point is illustrated that what are being attacked are not people but 'hot spots' on a screen. Whether any of the individuals seen close up would have been spared like the individuals in the anecdotes to which Walzer refers, is impossible to tell. What is clear, is that no opportunity is afforded to make the same judgements. The second clip may even be evidence of a war crime – the apparently deliberate attacking of individuals who are clearly wounded. Again, any opportunity for compassion is obscured by displaying the 'target' merely as a 'hotspot'. If we then recognise that these technologies are being used by servicemen brought up playing 'video games' that glamorise violence and, in many cases, encourage maximum destruction of 'targets' then the moral distance we are placing between soldiers and those we kill is all the more apparent.

This might be seen as the fulfilment of what Fuller presciently termed the ‘hidden impulse in the technological epoch of war’, namely ‘the elimination of the human element both physically and morally ...’.⁸⁸ He points to the advent of nuclear weapons as confirmation of an argument he had made (his manuscript was completed but unpublished when the first bombs were detonated) and warns of the dangers of man’s own inventiveness: ‘From out of the first flint axe and bended bow has at length emerged a Frankenstein monster – the inventiveness of today – that is destroying man’s own work, his own culture, his own civilization, his past, his present and his future.’⁸⁹

Already war has very nearly become a thing in itself – that is, an activity divorced from the very idea of peace – with destruction as its sole aim. Today this is becoming more and more apparent, because every type of atrocity is excused on military grounds, as if military reasons were the sole, let alone the highest values in war.

It is in this appalling dissolution of morality that armaments have played so great a part. Though man fashions them, it is they which endow him with the power to destroy, and to-day it is they which have got their maker by the throat.⁹⁰

As a final example of this tendency towards allowing technology to remove moral agency from the battlefield, we can consider the United States Army’s current major weapons procurement programme, Future Combat Systems (FCS), described as ‘the Army’s modernization program consisting of a family of manned and unmanned systems, connected by a common network, that enables the modular force, providing our soldiers and leaders with leading-edge technologies and capabilities allowing them to dominate in complex environments.’⁹¹ A combination of communications, computers, intelligence, reconnaissance and surveillance systems is intended to ‘synergistically interact enabling the Future Force to see first, understand first, act first and finish decisively.’⁹² At the heart of the concept is a belief that smaller, more agile forces can be achieved by relying on superior intelligence, coupled with greater stand-off distance to provide the protection once only possible through heavy, and strategic mobility-limiting armour. The risk is that if the promised superiority in intelligence is not delivered, or lacks sufficient granularity, protection will in fact be achieved by abandoning both proportionality and discrimination. All recent experience of complex non-linear battlefields would point to just this.

4.2.3 The Importance of Military Codes of Ethics: Warriors' Honour

An aspect of the Western way of making war that faces challenge from contemporary trends in conflict is the existence of an accepted code of conduct, imbued in professional armed forces as an essential part of their ethos. Before examining how this may be challenged by the evolving character of war, we should first examine the progeny and nature of this ethos: the warrior's honour.

In the evolution of Western cultures, at least, as long as men have organised themselves for combat they have subscribed to codes of conduct that distinguish the honourable from the dishonourable. That war is not simply a 'condition of generalized and random violence' we have already heard from Michael Howard (see p43). Values may change over the years and what is an acceptable level of violence in one generation is slaughter to another, (fortunately the trend has been toward a lesser tolerance of violence even as capacity has progressed in the other direction!); and values may differ across cultures; but there is plenty of evidence that even to the ancients there was a clear understanding of acceptable and unacceptable conduct in war. As Michael Ignatieff⁹³ puts it, codes of honour

... seem to exist in all cultures, and their common features are among the oldest artefacts of human morality: from the Christian code of chivalry to the Japanese Bushido, As ethical systems they were primarily concerned with establishing the rules of combat and defining the system of moral etiquette by which warriors judged themselves to be worthy of mutual respect.

That accounts of Agincourt (1415) give so much attention to Henry V's order to slay the French prisoners, offers some evidence that such an action was abnormal – even abhorrent – in medieval warfare; a view given greater weight by the refusal of his men-at-arms to carry it out. (Henry had to resort to the low-born archers to get the job done, and even then the evidence suggests that in fact very few were killed and the order may have been more about making a show and instilling fear in the captives to ensure their compliance).⁹⁴ The Chivalric code notwithstanding, European wars in the medieval age tended to inflict greatest damage on the civil population as the object was to destroy or confiscate an enemy's lands and possessions rather than risk direct confrontation with his military force or the costly business of besieging his castles. The re-codification of

the rules of war, beginning with the Religious Peace of Augsburg (1555) and continuing through the Peace of Westphalia (1648) to the development of early international law by the likes of Grotius, Pufendorf and Vattel (see Section 1.2.3), can be seen as a reaction to the increasing cost of war (in human and financial terms) made particularly apparent by the Thirty Years War. Warfare in the 17th and 18th Century became, then, something of a well-regulated stately dance between organised forces, by-and-large disciplined and well ordered and, again by-and-large, avoiding to a great extent any impact on the civilian population. Standing armies were simply too costly to be lost in wholesale slaughter. The advent of the *levee-en-mass* and the beginnings of total war following the French Revolution changed this again. To a greater extent than ever before nations and not just their armies were at war.

The 19th and 20th Centuries saw both an increasing involvement of the civilian population in the conduct and effect of war and, through war's industrialization, an ever expanding capacity for destruction. Even so, it is possible to find examples of those who sought, ultimately without success, to hold back this tide of change. JFC Fuller⁹⁵ draws attention to French Marshal Gerard's 1832 assault on Antwerp. Dutch General Chasse, commanding the defenders in the citadel, agreed to train his guns only on the open plains if Gerard would agree (as he did) only to approach from that direction, thus sparing the citizens and property of Antwerp. At the same time Western armies transformed themselves with military service becoming increasingly professional. These changes at once demanded the development of internationally recognized restraints on the conduct of war – to mitigate the scale of slaughter made possible by industrialization and to limit the effects on the civil populace – and saw the replacement of chivalric-based honour codes amongst the predominantly aristocratic officer classes, with the ethos and codes of conduct of a 'profession' of arms.⁹⁶

The 20th Century, as was shown in Chapter 1, saw increasingly strident attempts to curtail warfare altogether as an instrument of international policy, and the culmination of such attempts in the UN Charter, together with the re-formulation of the Geneva Conventions in 1949, largely rendered obsolete discussion of *jus in bello* insofar as the conduct of individual soldiers was concerned. There had been established, after all, a

paradigm in which war was only legitimate as an act of self-defence or collective security, and moral discussion was largely confined to the legitimacy of nuclear deterrence. The conduct of soldiers with regard to the wounded, to prisoners and to civilians was no longer a matter of honour but of law; the moral had been abrogated to the legal. The Vietnam War, and in particular the massacre at My Lai, reawakened concerns about soldiers' conduct but even these were overshadowed by *jus ad bellum* debates about the war's legitimacy *per se*.

However, the shifts in the character of war in the last decade of the 20th Century and into the 21st, have caused Western armies to re-evaluate their moral understanding, moral education and codes of ethical behaviour. The postural change from deterrence against major inter-bloc conflict to expeditionary and elective engagement in complex peacekeeping was a major driver for a re-examination of military forces' internal codes of ethics. (Other catalysts, not relevant here and so not considered further, were high profile incidents of improper behaviour of servicemen/women among themselves – especially in the training regime – and the pressures of societal changes in regard to issues of race, gender and sexual orientation). In societies that increasingly privileged the rights of the individual, a profession that traditionally required the subordination of individual rights to collective performance, found its values, once held self-evident, increasingly challenged and in need of careful re-articulation. A re-examination and re-assertion of professional military values was called for.

Given broadly similar experiences, challenges and cultural outlook, together with well-founded traditions of close military liaison and exchange of views, it should be no great surprise that Canada, the US, and the UK developed and codified broadly similar codes of military conduct. For Canada these are articulated in *Duty with Honour; The Profession of Arms in Canada*⁹⁷ as 'Canadian Military Values': duty, loyalty, integrity, and courage. These are in addition to and an expansion of the *Statement of Defence Ethics*, reiterated in the same publication: respect for the dignity of all people; service to Canada before self; and obedience and support to lawful authority. The US Army lays out its core values in *FM 1* as: loyalty, duty, respect, selfless service, honour, integrity, and personal courage.⁹⁸ The British version, in *Values and Standards of the British*

Army,⁹⁹ with its accompanying *Commanders' Guide*,¹⁰⁰ lists selfless commitment, respect for others, loyalty, integrity, discipline and courage, as core values. Obedience to the law – civil (wherever a soldier is serving), military and of armed conflict – and the avoidance of conduct that undermines trust, respect or professional ability, are listed as ‘Standards of Conduct.’

Some of these values have an obvious instrumental purpose in the maintenance of fighting power: subjugation of self to achievement of the mission; internal cohesion and effectiveness. The reasons for others, which go to the heart of how we expect our armies to conduct themselves today, may be less immediately apparent in such instrumental terms. As a British Army Doctrine Publication points out

(s)ome of the most barbarous and unprincipled military organisations in history have had tremendous morale and will to fight, based on excellent motivation, leadership and management, which have given them great military effectiveness and operational success. They have even possessed a greater external ethic to inspire them to conquest.¹⁰¹

Chapter 2 (specifically Section 2.3) discussed the continued need for moral justification of use of force and the imperative for proper conduct when armed force is used. It is for the reasons recounted there that we expect and require our military to ‘respect others’; to act with integrity and honour; that such values are necessary for us when they were not to the Vikings, Huns or Genghis Khan’s Mongol hordes. To recap, we must consider reasoning at three inter-related levels: the international, national and individual.

At the international level, conduct in accordance with the norms of international law and accepted standards of humanity, whatever the provocation, is important because it impacts directly on our national standing; any failing damages relations with allies and partners, and hampers our cause. As evidence consider the harm done to the United States’ reputation and standing by the Abu Ghraib prisoner abuse case, in particular, and then to the United Kingdom by allegations of abuse by UK soldiers. For a nation’s forces to act unjustly not only undermines the nation’s standing but impacts on its ability to gather together international coalitions of support, which even the most powerful nation requires for sustained military operations. If Moral Authority is

undermined and legitimacy questioned, then ‘soft power’ is reduced, which in the complex modern world is a critical adjunct to traditional hard power.

Nationally, improper conduct in war impacts on a country’s pride and sense of self worth but also undermines the reputation and standing of its armed forces. In the case of the Vietnam War, lack of support for the war, as well as concern over its proper conduct, undermined public trust in the US Army, leading to a crisis in morale from which, arguably, it did not fully recover until the 1991 Gulf War. Professional armed services thrive on their reputation and that reputation is tarnished by misconduct; soldiers feel this keenly and morale may suffer. Beyond this, such conduct and the damage it does to reputation can have a negative impact on recruiting.

Most importantly there are the men and women immediately affected – those of the armed forces who must execute their nation’s policy. We must consider the impact on these individuals of unjust – or dishonourable – conduct in war. In Chapter 2 (see p149), the argument was made that we are all diminished as human beings if we engage in activity that is ‘inhuman’. Being an effective killing machine is not enough; it is not an end in itself. There is a price to pay for inhumane behaviour – a loss of individual and corporate sense of humanity and worth.

This view is echoed in both US *FM I* and in Canada’s *Duty with Honour*: First, from *FM I*:

1-52. The *moral* dimension of the profession of arms lies in the fact that war is ultimately fought for ideas. Ideas motivate combatants. It is only in the moral dimension —when opponents understand and believe that they are defeated—that victory is complete. While the use of force is sometimes necessary for the common good, the authority to wield it carries a moral responsibility of the greatest magnitude. The morality of applying force in a just cause derives from ancient ethical and religious standards. The moral and ethical tenets of the Constitution and the Declaration of Independence form the basis of the military’s professional ideals. The Law of Land Warfare, Uniform Code of Military Justice, and Code of Conduct give structure to its moral standards.¹⁰² (Original emphasis).

and

1-61. The Army Values are the basic building blocks of a Soldier’s character. They help Soldiers judge what is right or wrong in any situation. The Army

Values form the very identity of the Army, the solid rock on which everything else stands, especially in combat. They are the glue that binds together the members of a noble profession.¹⁰³

Next, from *Duty with Honour*:

Incorporated in the military ethos, Canadian values mandate members of the Canadian profession of arms to perform their tasks with humanity. Members of the Canadian Forces understand the inherent violence of armed conflict, characterized at an extreme by death and destruction. While they must act resolutely, and sometimes with lethal force, the concept of humanity forbids any notion of a *carte blanche* or unbounded behaviour. Further, it demands consideration for non-combatants and items of cultural worth. Performing with humanity contributes to the honour earned by Canadian Forces members and helps make Canadians at home proud and supportive of their armed forces.¹⁰⁴

Codes of conduct are, then, essential to defining not simply how to fight but how to fight *our* way. They go beyond the legal constraints of IHL and help further to resolve the dilemma that exists for modern liberal democracies that liberal ends (freedom, democracy, human rights and individual security) must often be sought through illiberal means (violence)¹⁰⁵. Moreover, for the individuals who must fight on their nation's behalf, such codes provide the reconciliation between individual morality and actions that would otherwise be entirely contrary to modern social mores. In this way they act very much in the same way that early just war doctrine acted to reconcile Christian pacifism with the necessity of armed conflict. A later section will argue that the arrival of a range of new protagonists on the field of conflict challenges the warrior code.

4.3 Issues of Jus in Bello 2: Responding to How the West's Enemies Wage War ('Asymmetric' War)

Concern has already been expressed above about the efficacy of the term 'asymmetric' war. It has become something of a buzz-word in the lexicon of conflict and like all buzz-words it can be misleading. The aim of all warfare is to be asymmetric: we attack the enemy's weaknesses with our strengths, seeking our victory and his defeat. The asymmetries ascribed to the term's particular use today are those that have become associated with a trend in contemporary conflict towards a style of warfare that seeks to counter the West's superiority in conventional military strength. It is in this sense that

the term is used here, and in reluctant acceptance that however inaccurate it might be the term has fallen into use not just in common parlance but in the relevant specialist literature too¹⁰⁶.

Is there, then, a need to consider the moral dimension of asymmetrical warfare at all; are there aspects of it that require that its moral dimension be studied separately from that of warfare as a whole? Clausewitz would urge consideration of warfare as an entirety and more recently Colin Gray has cautioned similarly.¹⁰⁷ Certainly those who plan at the strategic and operational level would do well to heed this advice and press it on politicians too: asymmetric warfare is first and foremost *warfare*. This is not a semantic point; it matters because it is necessary to understand that in asymmetric warfare, as in any other kind, it is a political objective that is sought (by both sides); armed force is used as an instrument towards that political end. In asymmetric warfare, as understood here, the West's enemies seek to use force – and other means – asymmetrically; but still to achieve a political end. Understanding this is important because it must shape the response. In considering the response to asymmetric challenges it is the moral dimension that most needs attention for, as Brigadier Nigel Aylwin-Foster says, when confronting these challenges ‘... the moral and conceptual components of capability ... are likely to prove the most contentious and present ... the greatest challenges. ... Changing structures and platform capabilities is one thing: changing the way your people think, interact and behave under extreme duress is much more difficult.’¹⁰⁸

To recap the three principal characteristics in ‘new wars’ identified by Herfried Münkler¹⁰⁹ (see p173) are de-statization, that is the proliferation and increasing importance of non-state-actors; the attempt to focus violence on the weak and vulnerable, as a matter of deliberate policy, rather than against the enemy's military forces; and thirdly the ‘automization of forms of violence that used to be part of a single military system.’¹¹⁰ That is the use of guerrilla warfare and terrorism, once tactical options, as strategic ends in their own right. Each of these, singly and in combination, leads to asymmetries of direct relevance: between state and non-state actors; between regular and irregular forces; and between the law-abiding and the non-law-abiding. The

three are intertwined and inter-related but much of the focus of what follows is on the clash of regular with irregular armed forces.*

Terrorism, guerrilla and partisan warfare are all variants on this form of asymmetric warfare. Often the choice of terminology is value-laden but today all variants can be seen in use, separately and together, as a challenge to the West's conventional military superiority. The common factor is of a militarily inferior force (that is, inferior in numbers, weaponry, organisation and – generally – financial wherewithal) using means other than direct confrontation with their regular opponents. One way of doing this (most common in guerrilla and partisan warfare) is to wear down regular opponents through sudden, low-risk raids and attritional attacks on vulnerable installations, supply lines or isolated outposts. Another is to undermine political will and drive a wedge between the population on the one hand and the authorities and their regular armed forces on the other by demonstrating a continued vulnerability despite the government's attempts to assure the population of security and stability.¹¹¹

At this point it is just worth noting that although generally speaking in the sort of asymmetric war at issue here it is the militarily inferior side who seeks to attack the weak and vulnerable, there have been notable exceptions. In particular, the Soviet Union's war of occupation in Afghanistan through the 1980s yields plentiful example of the militarily superior side nevertheless bringing that might to bear extensively – and deliberately – on civilian targets, essentially in an attempt to control by de-population:

The Soviets had taken American tactics in Vietnam several steps further and fought a twenty-first century war, a war that was completely impersonal and therefore too dangerous for journalists to cover properly, in which the only strategy was repeated aerial carpet bombings, terrorism, and the laying of millions of mines. The Hind helicopter gunship, the workhorse of the Soviet military in Afghanistan, packed no less than 128 rockets and four missiles. It was able to incinerate an entire village in a few seconds. Against such measures, the very concept of battle had become nearly obsolete.¹¹²

* Asymmetric warfare may, of course, involve means beyond the use of armed forces: economic measures, 'cyber' attacks on essential IT infrastructure and so on. This work, however, deliberately restricts itself to issues involving armed forces, though acknowledging that their use in asymmetric warfare must involve more than simple 'kinetic' means.

Nevertheless, it is generally the case that attacking the vulnerable is a tactic resorted to by the weaker, irregular, side.

Whilst care must be taken to remember that asymmetric warfare is, at essence, warfare, empirically there is evidence to suggest that it poses its own specific problems. At the strategic level, the asymmetry of non-state-entities versus states, creates an immediate problem of how a state is to respond – especially as international law deals with relations and actions between states and says very little about non-state actors. When one state poses a direct and immediate threat to another, the threatened state's 'inherent right to individual or collective self defence'¹¹³ is clear and undeniable. When, however, the threat is from a non-state actor, how the right to self defence is to be exercised is far less clear-cut. Israel's 1985 attack on the PLO headquarters in Tunisia, the US attacks on targets around Tripoli in 1996 and on targets in Afghanistan and Sudan in 1998, all used the justification of self defence, but with far from universal acquiescence. Self defence was also the justification for the US-led invasion of Afghanistan in 2002, but rested heavily on closely associating the Taliban leadership with the actions of Al Queda.¹¹⁴ More recently, in 2006, Israeli attacks on southern Lebanon were justified by self defence but it was Hezbollah, not Lebanon, that was the threat to Israel.

Whilst acknowledging that asymmetric warfare poses moral and legal difficulties at the strategic level, the focus here will be on the specific characteristics of asymmetric warfare that complicate the moral dimension at the individual level; the *jus in bello* of those engaged at the tactical level. Here too, indeed more so, the empirical evidence is plentiful that this form of warfare poses its own special problems.

That it is so is evidenced throughout history when we find that irregular warfare, both symmetric (irregular *versus* irregular) and asymmetric (regular *versus* irregular), is far more littered with examples of atrocity, barbarism and morally reprehensible conduct than is regular warfare waged between professional, formally-constituted and organised, disciplined armed forces. We can take our examples from the conduct of the 'over the mountain men' and the irregular militias (both patriot and loyalist) in the American War

of Independence, the Napoleonic French army's bitter engagement with British-backed Spanish guerrillas, the irregular cavalry of the likes of Nathan Bedford Forrest in the American Civil War, the various militias and informal armies involved in the break up of Yugoslavia, or indeed, the 'post-conflict' phase of the recent Iraq War. On the latter the point is made by the fact that the author can think of no allegations of misconduct by coalition forces during the conflict phase and yet there has been a number of high-profile cases since the end of 'major combat operations'¹¹⁵ as the conflict has become an asymmetric one.*

Why should this be so; what is it about irregular warfare that challenges accepted norms of conflict and militates against moral conduct, even by the regular protagonists? Firstly, it is almost a defining characteristic of irregular (asymmetric) warfare that the weak become the target. Unable to match the military might of their regular opponents, irregulars seek to undermine political will by directly targeting the civilian population. Thus, as we noted above and heard from Mary Kaldor and Rupert Smith (see p176), it is a feature of contemporary asymmetric conflict that the civilian population bear the brunt of the casualties, as was generally the case before the statization of conflict in the 17th century. This is as true of ethnic conflict in the Balkans and in Africa, the insurgent campaign in Iraq and terrorist activity around the world. Even when the people are not directly targeted, irregulars will use them as a shield, as the screen behind which they can hide.

It is a deliberate aim of the irregular to blur the distinction between combatant and non-combatant, removing one of the moral sureties required by the regular. So it is a feature of asymmetric warfare that the civilian population are much more greatly involved. They are involved directly as a target but they are also involved as part of the 'terrain' that irregulars use for cover. Richard Holmes makes the following point in discussing US actions in Iraq in 2004:

The US assault on Fallujah received a uniformly bad press in Europe. What was drowned out in the torrent of abuse was the abundant evidence (credible to this

* It is only right to point out at this stage that although there have been sufficient incidents to illustrate the point about asymmetric and irregular warfare, it is in fact testament to the professionalism and moral integrity of coalition forces that proportionate to the number of troops deployed, the incidents of alleged misconduct are remarkably few as will be shown later.

potential critic) found of the presence of ‘foreign fighters’, the use of mosques for the storage of weapons, ammunition and explosives, the torture and murder of hostages¹¹⁶

Regular forces that are the targets of irregulars – terrorists, guerrillas or partisans – then face the moral difficulty of distinguishing friend – or more likely neutral – from foe. There is also the simple fact that in this form of warfare the military are brought into greater contact with non-combatants – ‘enemy’, neutral, friend, or most likely a mixture of all three – than they are in conventional conflict. This may be one reason why we find more numerous incidents of alleged mistreatment. It was an attempt to remove this civilian ‘terrain’ from the equation that led to Britain’s misguided – and ultimately disastrously inhumane – introduction of ‘concentration’ camps in the Boer War. In fact, proper engagement with the civilian population is a key activity in countering asymmetric warfare.

Furthermore, the lack of distinction between acts of war and acts of crime means that military forces find themselves not only engaged in traditional and non-traditional combat operations but needing, too, to deal with organised crime, drug production and transportation, and human-trafficking. The nature of contemporary *security* challenges, much wider than traditional *defence* issues, will result in a need ‘to collaborate not only with forces from other countries but also with civilian, non-governmental relief providers.’¹¹⁷ Much of this is new territory for military forces and beyond their traditional training and moral mind-set.

The omnipresent nature of the media adds further to this dimension. The ability of non-state actors to influence the decision-making process in democratic states, particularly, through media impact on public opinion, plays a key role in the development of asymmetric warfare. The so-called ‘Mogadishu-effect’ after the US withdrawal from Somalia following the very public and brutal killing of eighteen US soldiers in 1993¹¹⁸ is a glaring example of the West’s potential vulnerability to this. Instead of traditional war reporting we have a reporting war¹¹⁹ which provokes and promotes the use of media events such as hostage-taking and highly stage-managed executions such as those seen in Iraq throughout 2004-2005. Sometimes through misunderstanding, sometimes deliberately, either as a result of manipulation by our asymmetric opponents or in the

ill-thought-out search for a sensational story, the media can misrepresent events, handing a propaganda victory to our opponents and alienating an otherwise neutral population. Münkler puts it thus:

Those who have no capacity to attack the conventional armed forces of a certain state with any chance of success seek to disseminate images in which the consequences of acts of violence are made directly visible. A sense of horror is produced through recorded images, not only of violence against soldiers but also of violence used by the regular armed forces (for example attacks on trains, housing or non-military factories and, most especially, the killing of women and children). Pictures of the latter kind, whether genuine or falsified, are meant to shake the good conscience underpinning the enemy's political will¹²⁰

Not only do these factors combine to challenge the moral sureties expected by the regular soldier – the combatant/non-combatant distinction, lawful/non-lawful and so on – but they may lead to frustration: a temptation to hit out at what can be hit. This seems a likely explanation for the more numerous allegations of wrongful behaviour by regular soldiers in asymmetric than in conventional conflict. At its least damaging this frustration can result in overreaction, which can vary in scale. At the lower end of the scale individual soldiers may lash out disproportionately or even indiscriminately. Consider, for example, the British soldiers allegedly beating captured petrol bombers in Basra (probably in 2004 but brought to light by video released to *The News of the World* in February 2006).¹²¹ At the other end of the scale frustration and outrage can drive the tactics of counter-insurgency towards an arguably over-zealous offensive use of force. Brigadier Nigel Aylwin-Foster argues that just such a combination of moral self-righteousness and deep emotivity – easily outraged by insurgent atrocity – led, on occasions, to an over-reaction and disproportionate response by US forces in Iraq:

The most striking example occurred in April 2004 when insurgents captured and mutilated 4 U.S. contractors in Fallujah. In classic insurgency doctrine, this act was almost certainly a come-on, designed to invoke a disproportionate response, thereby further polarising the situation and driving a wedge between the domestic population and the Coalition forces. It succeeded. even those U.S. commanders and staff who generally took the broader view of the campaign were so deeply affronted on this occasion that they became set on the total destruction of the enemy. Under emotional duress even the most broad-minded and pragmatic reverted to type: kinetic.¹²²

However, at its worst this frustration, fuelled by outrage and understandable moral indignation, and possibly sometimes by a sense of moral and cultural superiority, can translate into full-scale atrocity as at My Lai.

The My Lai Massacre serves also as an extreme example of what can be interpreted as a gross misconception of ‘enemy non-combatants’. That is to say the tendency automatically to identify with the enemy all those of the same nationality/ethnicity as him. When regulars cannot then strike the enemy directly, they may be tempted to attack him through the proxy of these ‘enemy non-combatants’ – in a mirror image of the asymmetric fighter’s attacks on the civilian population. The term is in itself a dangerous one. It makes some sense in symmetric inter-state war and, indeed, allows us to avail ourselves of the doctrine of double-effect. But the term surely has little meaning if any in asymmetric warfare and most especially not in conflicts of humanitarian intervention/rescue in which the civilian population are not ‘enemy non-combatants’ – to whom foreseeable but unintended consequences are acceptable proportionate to military necessity – but the ‘victims’ whose rescue is central to the *jus ad bellum* of the conflict.

Given this range of additional moral challenges when engaged in asymmetric conflict, it is necessary to consider the specific, and topical, issue of soldiers’ accountability and culpability in these circumstances. The issue arises because of the additional challenges outlined, and because these soldiers are invariably operating not under the LOAC/IHL but in accordance with national domestic law, or the rules governing use of force by an occupying power; they are operating among the civilian population; and the distinctions, as has been argued above, between combatant and non-combatant may be obscured – often deliberately. At the same time that they may be operating in an unfamiliar manner, restrained in the use of force, they could be dealing with an enemy who, through atrocity and through attacks that cannot easily be responded to, seeks to cause frustration, anger and extreme emotional duress that may cause over-reaction including indiscriminate and disproportionate responses.

In July 2005 six former UK Chiefs of the Defence Staff, all now members of the House of Lords, specifically attacked the UK government's handling of the issue of soldiers' accountability and culpability in the conflict in Iraq¹²³. Additionally, elements of the UK media¹²⁴ suggested that soldiers were placed at risk and unable effectively to carry out their mission because of an undue danger of prosecution. Clearly a balance must be struck between soldiers' accountability and culpability under the law and their ability to do their job, which is, at essence, the delivery of (up to and including lethal) force to achieve a political end.

Although today's changed operational environment offers additional challenges, there is nothing new (at least not in modern history) in soldiers being held to account under the law for their actions. A pertinent historical example is provided by the so-called 'Boston Massacre' of 1770. It is a useful example because it illustrates a number of points relevant to the contemporary debate. The incident arose when British soldiers guarding the Boston Customs House were confronted by a mob. In the confusion of the *mêlée* that ensued, shots were fired by some of the soldiers and five civilians, unarmed (at least not with firearms), were killed. The young officer in command of the soldiers, Captain Preston of the 29th Foot, was charged with murder. In arguments that resonate today there were claims that his trial was politically motivated – he was to be a scapegoat to appease rebel sentiment. Defended by, despite his separatist sentiments, future President John Adams, Preston was acquitted because it could not be proved that he ordered his men to open fire (indeed, eye-witnesses avowed that he did not). Eight soldiers were then tried for murder; if no order had been given then they acted of their own accord and illegally. Adams defended them, too, and six were acquitted. The remaining two were convicted of manslaughter and claimed 'benefit of clergy' – an arcane practice that placed them outside the jurisdiction of civil punishment but required instead that they be branded on the hand as a mark of shame.

What points does this example illustrate? Firstly, the key point here, that it is not a new issue that soldiers be held to account for their use of force, especially in what might even then have been termed asymmetric warfare. Secondly, then as now there were those who saw such accountability as politically motivated and, then as now, there were

suggestions of an impact on operational effectiveness. Hugh Bicheno ascribes to concern for his legal position the reluctance of Henry Clinton, Commanding British forces in America some time after the Boston incident, to take firm action against the rebels:

.... for as long as the conflict was regarded as a rebellion, and not a declared war, recent legal precedents were not such as to encourage an Army officer to take drastic action. The soldiers who fired on the Boston mob in 1770 had been put on trial for their lives, and there had been other examples in Britain of the same happening to officers who acted to quell disturbances without a magistrate, and even of magistrates for having authorized the use of deadly force. For as long as his superiors chose not to take the responsibility on their shoulders in formal written orders, Clinton was wise to refrain from outright counter-terrorism.¹²⁵

Thirdly, it illustrates that asymmetric enemies have long sought to advance their cause not through direct confrontation but by provoking an overreaction by their regular opponents that undermines legitimacy and moves an otherwise neutral population towards the insurgent cause. (There is little historical doubt that the ‘motley rabble of saucy boys, negroes and mulattoes, Irish teagues and outlandish jack tarres’¹²⁶ had been deliberately whipped-up by John Adams’s more extreme cousin Sam); a key reason why such overreaction must be avoided and the forces of the state shown to be accountable to the law.

That is not to say that all cases of apparent wrong doing have been properly or effectively held to account. The Amritsar Massacre of 1919 is a stain on British military history. In April 1919 Brigadier General REH Dyer led a small contingent of British troops into the Jallianwalla Bagh in Amritsar and ordered them to open fire into an unarmed crowd. Deaths are estimated at about 400 with a further 1200 wounded. Dyer was removed from command and placed on the non-active list. Defending the Government’s decision not to offer Dyer any further appointment, Winston Churchill, then Secretary of State for War, described the events as an episode which

appears to me to be without precedent or parallel in the modern history of the British Empire. It is an event of an entirely different order from any of those tragical occurrences which take place when troops are brought into collision with the civil population. It is an extraordinary event, a monstrous event, an event which stands in singular and sinister isolation.¹²⁷

Nevertheless, no formal disciplinary measures were taken against Dyer.

Nor does the expectation of being held to account always preclude heinous acts of barbarism among soldiers even of ‘civilized’ nations. Whether the British after Badajoz, the Germans and the Russians on the Eastern Front, Americans at My Lai or Canadians in Somalia*, atrocities happen. However, these are recognised as atrocities, as aberrations in the way we expect armies to behave, as breaches in the codes, both formal and informal, of discipline and honour that are at the core of professional soldiering. The very fact that they stand out to us identifies that we generally accept them as things that should not happen. This, like the high-level disapprobation† leveled at Dyer’s actions, further supports the claim that it is not a new phenomenon that soldiers be held to account for their actions, especially in conflicts that fall outside the morally more clear-cut framework of conventional army vs army war.

In conventional, symmetric conflict we might argue that reciprocity is a driver for abidance by rules. Clearly, though, it is not a driver in asymmetric conflict; however decent we are, the tactics of the irregular will not be favourably influenced; at essence there he seeks advantage from what has been described as a ‘moral asymmetry’¹²⁸; we abide by the rules whilst he does not. The arguments advanced in Chapter 2, and recapped above in support of the warriors code (See p286), are equally applicable in asymmetric war, albeit sometimes harder for the regular to understand. Moreover, from an instrumental perspective there are examples throughout history where oppressive or over violent conduct by governments, whether or not in response to the provocation of asymmetric opponents, and whether an act of deliberate policy or from unofficial and ill-disciplined acts by a minority, has had entirely negative outcome for them.

Drawing on more recent experience, Brigadier Nigel Aylwin-Foster quotes an anonymous US Army Colonel in Baghdad in September¹²⁹ 2004: ‘If I were treated like

* In support of an earlier point, it is worth noting that all bar the first of these cases involve at least a degree of asymmetry provoking brutal response by regulars. In the first case there is still a case to be made that it was the frustration of receiving casualties whilst unable – for a considerable time – to hit back, coupled with a belief that the besieged population had sided with their French occupiers – that explains – not excuses – the British rampage.

† Public reaction was more mixed, with one newspaper raising a considerable sum through public subscription to give to Dyer.

this, I'd be a terrorist!' In conflict of this kind the otherwise neutral population can become a political battleground – their 'hearts and minds' an objective for both sides. It should be obvious then, that careful treatment of them becomes a strategic necessity. Equally it is a strategic necessity for the asymmetric opponent to win on this battleground. Improper conduct, whether heavy-handedness or abuse, is an opportunity to be exploited in this key campaign. We can include in this, what some commentators¹³⁰ have termed 'lawfare' – the attempt by asymmetric opponents to exploit the legal asymmetry by highlighting and publicising any actual or perceived infractions by us whilst himself remaining in any case unbound himself.

Colin Gray, recognising the historic reality that asymmetric warfare provokes misconduct and abuse, argues that, contrary to the prevailing view, repression does work as a means of counter-insurgency:

It is only fair to point out that irregular warfare almost invariably drives the regular belligerent to behave terroristically towards the civilian populace that provides, or might provide, recruits or support for the guerrillas. The irregular warrior is obliged by his relative weakness to be elusive. That structural reality about irregular warfare tempts the regular combatant – German, French, Russian, British, American, Portuguese, and others – to strike at those it can reach. Those who the regular can reach are the inhabitants of the civilian sea in which the guerrilla fighter must swim, to employ Mao Tse-tung's famous metaphor. The winning of 'hearts and minds' may be a superior approach to quelling irregulars, but official, or extra-official but officially condoned, military and police terror is swifter and can be effective. The proposition that repression never succeeds is, unfortunately, a myth. Half-hearted repression conducted by self-doubting persons of liberal conscience certainly does not work. That will be as true in the future as it was in the past. Whether or not contemporary and future changes in values in many societies will deny regular belligerents extreme, indeed purposefully disproportionate, terroristic violence as a practical option in the conduct of irregular war, remains to be seen.¹³¹

However, an argument may be made that Western democracies have indeed reached the stage where society's values, coupled with an omni-present media, have indeed denied their regular forces 'purposely disproportionate, terroristic violence' as a means in the conduct of irregular war. If they are, then, to avoid, the inevitable failure of 'half-hearted' repression, they must not go down the repression route at all!

How, then, is proper conduct to be ensured, whilst operational effectiveness is maintained; how can it be ensured that those who commit wrongful acts are brought to account, without the majority being hampered – as some elements of the media have suggested they are – by concern about over-restrictive rules limiting their use of force? It is helpful here to reiterate explicitly a distinction that should already have become apparent. Discussing the issues of Rules of Engagement (RoE) in Iraq, Richard Holmes offers the following:

Breaches of both the law in general and these specific rules (RoE) occur in two broad sets of circumstances. In the first, men overreact in the stress of combat, perhaps by using more force than the situation warrants, or by engaging individuals who have not in fact made themselves liable to attack under the rules of engagement.

The deliberate mistreatment of prisoners is quite another matter: here the soldier is usually at little risk, and rarely acts in hot blood, although the memory of recent acts by the prisoners or their friends may fuel his resentment. But a minority of soldiers may too easily imagine that it is absurd to behave with studied correctness towards men they regard (often not without cause) as torturers and murderers; they may believe that they are helping their own cause by giving prisoners a 'hard time', and they will be inclined to interpret a nod and a wink as a veiled order to behave badly.¹³²

The second set of circumstances is straightforward. We can sympathise with soldiers' stress, but we cannot condone improper treatment of the wounded, of prisoners, or of the civilian population. Those who act wrongly dishonour their nations and their profession. Armies, having recognised that the nature of asymmetric warfare may increase the likelihood of such misconduct, must ensure that their training, especially of junior commanders, is cognisant of the threat. This is not, however, the set of circumstances of greatest concern; we know such conduct is wrong and we know what we must do to minimise it (we will never entirely eradicate it).

The issue of most concern, then, is how to strike the right balance between judicious use of force, soldiers' individual accountability for its use (and culpability for its misuse) and operational imperative. There are essentially three mechanisms: the law (International, domestic and military); military ethos discipline and training (of which a key part is the warrior code discussed above – see p283); and RoE.

The main source of international legal restraint is the considerable body of IHL dating back to the first signing of the Geneva Convention in 1864, key to which are the 4 Geneva Conventions of 1949 (which for the first time extended the protection of IHL to civilians), and the 2 APs of 1977. However, and notwithstanding the extensions afforded by the APs to circumstances beyond inter-state war, they offer little help in asymmetric warfare (except in relation to how regular combatants must treat civilians). Colin Gray reminds us that

(t)he modern law of armed conflict was not written to define and protect the rights of the irregular, and possibly occasional warrior. The legal context has been changing in favour of a greater inclusivity, but irregular warfare in all its forms remains a notably under-regulated field of strategic behaviour. Since such warfare is especially prone to register abominable behaviour, the weakness of the relevant law of war is particularly regrettable.¹³³

The obvious retort is that we could hardly expect most irregulars to abide by the rules in any case: the legally-bound *vs* unrestricted is one of the asymmetries we have identified as likely to be sought and exploited in this form of warfare. But Gray's point can be extended: IHL as it stands offers little guidance to regulars fighting asymmetric opponents, either. There is an unsurprising tendency, then, in counter-terrorist operations and the so-called post-conflict phases of interventions such as that in Iraq, to rely on the laws of peace. As Gray also argues 'Governments must treat terrorists as criminals because the conflict is very much about the respective legitimacy of two the sides in the eyes of society (Nevertheless,) terrorism is warfare and terrorist are soldiers.'¹³⁴ Although Gray goes on to describe this 'strategic fact' as 'legally inconvenient', in fact reminding ourselves again that asymmetric warfare is, indeed, *warfare*, and treating terrorists as enemy combatants may be a useful approach. For it would allow us to apply the laws of war, to accept more readily the inevitability of innocent deaths caused by both sides, and allow us to turn for guidance to the just war principles of discrimination and proportionality tempered by the doctrine of double effect.

Some commentators¹³⁵ have alleged that developments to IHL and Human Rights Law have placed soldiers under new and undue threat of prosecution or else have made them reluctant to use their weapons. In fact closer examination than afforded by newspaper

headlines (and which space precludes a diversion into here) shows that changes are largely in perception and presentation; the UK's Human Rights and International Criminal Court Acts, against which most criticism has been directed, are, in fact little more than re-packaging of existing legislation. There is, in fact, little new in either Human Rights Law or IHL that places soldiers under any greater threat of legal culpability than before. Some comment is necessary, though, on the role of RoE.

Bearing in mind the likely (political) need, alluded to above, for greater restriction to use of force, it should be no surprise that asymmetric conflicts see the application of especially restrictive RoE. In Chapter 3 (see p215) the importance was argued of entering into elective conflict only if prepared to expend the necessary resources, which must be taken to include political capital (at home and abroad). RoE may be seen, in part, as an expression of political will. They are not themselves a legal pronouncement but they are both a guide to interpretation of the law and an expression of political restraint¹³⁶. Such political restraint is right and proper – a political end is being sought and, in the sort of complex conflicts under discussion here, greater subtlety – and restraint – may be needed that in classic state-on-state war. Moreover, as UK Attorney General Lord Goldsmith has said, 'there is a danger in thinking that the law is all. Legality is a necessary condition for use of force but not sufficient'.¹³⁷ Professor Lawrence Freedman argues that in part, at least, RoE are an attempt to ease the tension between the liberal inspiration (humanitarian, rescue, protection of individual rights etc) and illiberal means (use of armed force) that exists in contemporary 'discretionary' conflicts.¹³⁸

The danger has already been noted that if we fail to recognise asymmetric warfare as *warfare*, in particular if we conflate it with peace-keeping, then we may hamper effective use of force by over restrictive RoE. There must, of course, be a balance between the need to engage effectively the asymmetric opponent, and political imperative to minimise collateral damage and casualties – not least because of the need effectively to engage with the 'neutral' population, and cognisant of the redundancy of the term 'enemy non-combatants'. Moreover, the more robust approach is inappropriate for peacekeeping operations. Indeed, Mary Kaldor¹³⁹ argues quite compellingly that in

peacekeeping operations the mindset and ethos required is not that traditionally maintained by the military, but that of the policeman; that is to say one in which the life of the 'victim'/innocent passer-by is paramount, even above that of the policeman whereas the military in conflict take advantage of the doctrine of double-effect to place their own lives above that of 'enemy non-combatants'. The point to be grasped, and perhaps from a failure to grasp which stem some of the difficulties in theatres such as Afghanistan and Iraq, is that asymmetric warfare is not peacekeeping*. In asymmetric warfare it is not the policing or peacekeeping mindset that will be the best guide, but military necessity bounded by the traditional *jus in bello* tenets of discrimination and proportionality. It would be when weighing up proportionality and when looking to the protection of the law of double effect, however, that we would need to be especially mindful of the political aim that use of force should be serving; invariably in asymmetric warfare our use of force will be restricted to a far greater extent than in open conflict between two regular protagonists.

Major General Jonathan Riley¹⁴⁰, whilst contending that UK RoE in Iraq were, by 2006, appropriate for the theatre, has suggested that post-conflict in 2003 they were overly restrictive. Although they were revised appropriately in 2004, the psychological damage had been done: soldiers were reluctant to open fire. Part of the problem for the UK armed forces, perhaps, was the long-standing situation in Northern Ireland where the Army was rightly in support of the police and operating under very restrictive RoE. Add to this a decade or so of peacekeeping and a mindset had been established that was, perhaps, unready for the much more aggressive RoE called for by the asymmetric conflict in Iraq. Nor is this the first time there has been a confusion between the requirements of peacekeeping and those of asymmetric warfare (or where what was intended as peacekeeping became *de facto* asymmetric warfare). General Riley¹⁴¹, again, argues that the Bosnian conflict – at Gorazde, for instance – offers examples where there was disconnect between ends and means (as restricted by RoE). Outside of

* In fact it would be fairer to recognise that the difficulty stems from the complex admixture of regular and asymmetric conflict, peace support, peacekeeping and humanitarian rescue that has characterised these operations.

peacekeeping, when Kaldor's 'police ethic' is appropriate, RoE must reflect the reality that asymmetric warfare is *warfare*.

All this can make for a very confusing set of circumstances for soldiers on the ground. However, the British Army's Adjutant General has argued¹⁴² that despite the media furore, in fact no British soldier has been tried as a result of his actions in a tactical situation in Iraq.* We must hope that this continues to be the case; whilst robust RoE may never excuse murder, asymmetric warfare must be fought as warfare and soldiers must be confident in their actions. No soldier should ever find himself in court for acting *in good faith* in a tactical situation into which others have placed him. If the rules may be complex and difficult to interpret in a tense and dangerous battle situation, a deeply engrained, indeed intuitive, understanding of the *jus in bello* principles should provide soldiers a sound guide as to what constitutes good faith. When Private Johnson Beharry of the Princess of Wales Royal Regiment was interviewed about the action that resulted in his being awarded Britain's highest award for gallantry, the Victoria Cross, his response was that 'the training just kicks in'¹⁴³; his response to the situation, he modestly asserted, was an instinctive one. The same training that led to Beharry's instinctive gallantry, saving his colleagues' lives, must be the bedrock of soldiers' judgement calls in the complex tactical situations presented to them by asymmetric warfare; their judgements 'in good faith' must be based on a firmly embedded understanding of right from wrong. In the vast majority of cases, the evidence suggests, we can be confident that this is so; in one or two – as we have seen from cases of prisoner abuse – it is not.

4.4 New Protagonists: Challenges to the Warrior Code

The final issue to be considered as a challenge offered by trends in contemporary conflict to traditional understandings of *jus in bello* is the emergence (or in some case re-emergence) on the battlefield of a range of new protagonists. Among those who might be considered are the media, child soldiers, irregular militias with little or no

*Perhaps the most celebrated of cases arising from the Iraq conflict, that of Trooper Williams, reached the stage of pre-trial hearing before being dismissed by the Judge.

military training or discipline – including those driven by the fervour of extremist interpretation of religious imperative and those motivated by the politics of exclusionist ethnic identity – and PMCs. What this amounts to is a range of additional protagonists who may be driven by agendas different to those of the professional military forces of Western nations, and far less steeped in either understanding of just war principles or the warrior's honour discussed above (see Section 4.2.3). The impact of these new arrivals is noted by Münkler thus:

From Mujahedin networks to contingents of hastily recruited fighters, from distinguished-looking security firms linked to the top addresses in the arms trade through to rowdy adventurers noted for their overindulgence in alcohol and for going weeks on end without washing to preserve the traces of battle: none of these consists of state subjects fighting out of a mixture of political duty and patriotic attachment to cause, but rather of individuals driven mainly by financial gain, a lust for adventure and a range of ideological motives. There can be no doubt that this motley group ... is removing more and more of the limits to the violence and brutality of war.¹⁴⁴

Space precludes that all of these groups should be properly examined here, so just two – PMCs and child soldiers – have been chosen for closer examination. The reasoning behind this choice is that it allows discussion of one set of new protagonists most likely to be found working for, with, or under the protection of Western nations; and one set to be found almost exclusively among our potential opponents.

4.4.1 PMCs

A characteristic of contemporary warfare already noted is an increased involvement of civilians and, thus, a blurring of traditional boundaries between combatant and non-combatant, between soldier and civilian. Either through deliberate targeting, use as shields or simply as a result of the increasing urbanisation of warfare, the civilian population is now a significant part of the terrain of conflict. Beyond this there is an ever-increasing range of civilian contractors working in support of the military in an array of posts that seems to be bringing them interminably closer to actual combat. The UK, for example, now has Private Finance Initiative (PFI) contracts for transportation of heavy armoured vehicles and the ownership, delivery and maintenance – including in operational theatres – of engineer plant equipment. It must be recognised as a serious

challenge to the concept of warrior's honour, that we increasingly see on the modern battlefield those whose motivation is neither duty to country nor personal honour, but financial reward.

A related trend that can be seen is the increased significance of profit as a motive in contemporary conflicts. Whilst there have always been those able and ready to turn warfare to their own financial advantage, today, particularly in those wars resulting from the failure of states, the economic motive has for many become an object in itself. If financial gain for some has been a concomitant of 'old' wars, it has become a central focus in 'new' ones. New wars demonstrate a commercialization/privatisation that replaces political and patriotic motivation with financial.¹⁴⁵ Conflict provides the environment in which opportunistic warlords can gain enormous commercial benefit through drug and human trafficking as well as the more conventional trade in arms.¹⁴⁶ The nature of the economy generated by the new wars also dictates their character. Because they rely upon 'exploitative forms of financing ... (which) depends on an atmosphere of insecurity, (there is) a vested interest in perpetuating violence.'¹⁴⁷

PMCs are, then, but one aspect of this appearance (or more properly, enlargement) of the profit motive on the battlefield, and one that intersects with the tendency for increased civilianization. Their emergence as a significant phenomenon can be traced to the early 1990s, resulting, according to P W Singer, from three interacting dynamics: 'the end of the Cold War, transformations in the nature of warfare that blurred the lines between soldiers and civilians, and a general trend toward privatization and outsourcing of government functions around the world.'¹⁴⁸ As Western governments sought to downsize their militaries in search of the 'peace dividend', a tendency to global instability actually demanded more troops. Furthermore, as the character of war changed, becoming more confused and less dominated by professional armed forces, so Western governments become less willing to be officially engaged. The complication this trend presents for international law is described by Michael Byers:

Mercenaries – persons who fight solely for financial gain – are not entitled to be treated as prisoners of war. The increasing use of private contractors by the US* military, in some cases very near or even in the combat zones, raises questions

* The issue, of course, is not at all confined to the US.

as to what, if any, rights – beyond international human rights – these individuals have if captured by opposing armies. At the same time, the extended involvement of these contractors in activities traditionally reserved to military personnel is obfuscating the all-important distinction between combatants and civilians, with potentially serious consequences.¹⁴⁹

As the quote above from Münkler (see p305) implies, PMCs embrace a wide range both in terms of activity and of quality and reputability. At one end of the spectrum of activity – their use as surrogates for state action, there can be no doubt that their use has sometimes been successful and brought about desirable results. The South African company, Executive Outcomes, achieved considerable success in their support for the failing government of Sierra Leone at a time when Western governments were unable or unwilling to commit forces.¹⁵⁰ Critics may argue that – as with Executive Outcomes in Sierra Leone – the absence of long-term commitment and the mixed motivation (there were allegations of links to big business interests in mineral mining rights) undermines the legitimacy of such operations; when the profit margin shrinks the conflict may be abandoned. However, when such interventions are conducted by governments in the name of policy or international peace and security, interest can be equally short-lived and motives just as mixed.

Furthermore, the use of contract staff to support the military in the area, for example, of Security Sector Reform, allows greater engagement in this activity than would otherwise, in all likelihood be possible. US-led efforts in Afghanistan, for instance, to reform the Ministries of Defence and the Interior, and to recruit, train and equip an army and police force loyal to the government, are extensively underpinned by the use of ex-military and police officers employed by MPRI and DynCorps

Whilst Münkler's description fits a common image of certain types of PMCs – particularly the mercenary forces used in African wars of the 60 and 70s (as well as the other profit-motivated irregular forces that have been a feature of recent conflict), this very negative image is inappropriate for a large number of companies operating in the sector today. This is part of the problem in discussing or seeking to regulate or limit PMC activity – it is a very broad church. Paul Jackson points out that although the larger and better known (and better regulated) PMCs operate out of the UK, USA,

France and Israel, the sector has expanded rapidly, especially in the Russia and Ukraine.¹⁵¹ Whilst in one sector of the industry there might operate shadowy teams of ill-regulated mercenaries willing to do anything for the right price, at the other are globally recognised businesses such as Kellogg, Brown and Root (KBR), Halliburton, AmorCorp and Aegis. The latter boasts both a former UK Chief of the General Staff and a former UK Chief of the Defence Staff on its board. Of course, being a large internationally renowned firm is no cast iron guarantee of proper behaviour. Aegis suffered bad press as a result of allegations – subsequently proved unfounded – of improper conduct by that its staff allegedly shown in a ‘trophy video’ in Iraq (something it took swift action to have independently investigated)¹⁵², and Halliburton has faced allegations of overcharging¹⁵³. More recently still the US firm Blackwater faced serious criticism that had significant implications for US policy in Iraq and led it to its facing a Congressional enquiry¹⁵⁴. Large, well-known firms clearly have a business interest in being seen to be operating both within the law and ethically, and but that will not always guarantee either their corporate behaviour or the conduct of individual employees.

Concerns remain, then, about the growth of this sector. Jackson¹⁵⁵ and Singer¹⁵⁶ point to the following key difficulties with PMCs:

- First and foremost the profit motive which clearly distinguishes PMCs from the military; the incentives of PMCs do not necessarily align with government interest and policy. Not least, they have a vested interest in continuing conflict. There have also been occasions on which PMCs have abandoned contracts when they have become too costly or dangerous;
- Secondly, industry standards of self-regulation. Whilst, as noted above, it is generally in the interests of the big players to ensure the quality and professionalism of their staff, sometimes the speed of events leads to corner-cutting. There is plenty of evidence of this having happened as recruiting expanded exponentially to fill the market after the 2003 invasion and occupation of Iraq;

- The third issue, which is also one of PMCs' attractions, is the lack of democratic accountability of their actions, since they can be used as surrogates when official government action would be politically unacceptable;
- Fourth is the legal (and we might add, moral) grey area they create;
- And, finally, there is the impact on the military profession itself. PMCs are a challenge to the military profession's 'uniqueness'; potentially a draw for trained – but financially disaffected – manpower; and, central to the argument of this thesis, represent a challenge to the core values of the warrior code.

On the other hand, PMCs, operating to the laws of market forces, are clearly filling a gap. It is a gap that many in the military may feel should never have been opened but it is a gap that nevertheless exists. As governments have sought to outsource greater and greater ranges of activity traditionally the preserve of the public sector, the military has not been exempt. It seems most unlikely that this particular clock could ever be turned back. The British Army today, and it is not alone, is struggling to recruit to establishment. It is certainly not in a position, however much soldiers might wish that it were, to return to uniform those many support services that have been civilianised and contractorised over the last two decades. Indeed, the trend remains firmly in the other direction.

We are left, then, with the inevitability of PMCs. There is much work to be done to determine and then enact appropriate regulations¹⁵⁷, including both international and domestic legislation, but PMCs are not going to go away. For professional military people the key concern must be that whatever restrictions may or may not be placed on the wider use of PMCs, many of the armed services' vital support functions have been outsourced and are likely to remain so. Servicemen and women are reliant, therefore, certainly for operational effectiveness and potentially also for their lives, on people who do not necessarily share the same ethic-set or common bond of service. Selfless commitment that features (in one form of words or another) in the British Army's *Values and Standards* in Canada's *Duty with Honour* and the US *FMI*, cannot be assumed of PMCs. This is neither to say that civilian contractors are without honour, nor to decry the conscientious and dedicated service of many (and past wars – albeit

ones of national survival, not elective policy – are replete with examples of civilian sacrifice). However, the challenge must be recognised of an increasing encroachment into the military profession by a range of people who do not share in the concept of warrior's honour and who are not necessarily as well-versed as professional soldiers in IHL or as cognisant of *jus in bello* values. Professional military forces must recognise this and do all they can to promote and share such values, not least by living to them as an example to follow.

4.4.2 Child Soldiers

Finally, we turn to consideration of one of the sets of new protagonists more associated with the west's potential opponents and a frequent player in asymmetric (in the sense used throughout this chapter) conflict.

Whilst on the one hand the industrialisation of warfare throughout the twentieth century led to a technical complexity and expense in weapons systems that made them the preserve of the richest states, at the other end of the scale it led to a plethora of cheap, easily manufactured and – most importantly – easily maintained and operated firearms and explosive devices (including anti-personnel landmines), deadly in the hands of the least sophisticated, least-trained and (the key point here) youngest of would be killers. Wars in Africa, especially, have been marked by the massive rise in deliberate use of child soldiers¹⁵⁸. As William Shawcross notes:

In countries like Liberia and Sierra Leone, UNHCR and other agencies had to deal with crises in which state structures had unravelled and violence had become an end in itself, profiting warlords and their factions The nefarious proliferation of cheap small arms since the end of the Cold War had vastly worsened the problem and spread violence to children. "For many children today," said Ogata (senior UN official), "thou shalt not kill is no longer the norm; it is not even a pious wish."¹⁵⁹

Aside from the obvious immorality of this in itself, the challenges it poses to regular soldiers confronted by armed children are clear. Major James Coote describes the impact of seeing one of his soldiers severely injured in Iraq by a petrol bomb thrown by a child of around eight years old:

We had been stoned by kids before, seen the gunmen using women and children as human shields and as carriers to take weapons across the street from one fire position to another, in themselves cowardly acts, but this was the first time someone had sent a child to physically attack us. It was extremely difficult for me to calm myself and the company down, particularly as one or two of the younger lads were understandably traumatized by the experience.¹⁶⁰

Trooper Ken Boon recalled his inability to fire at an attacking child: ‘.... a young lad in his early teens threw a grenade at me, I could have shot him easily but instead I took cover because I can’t kill a child that had probably been told to throw it.’¹⁶¹ Commendable though his humanity may have been, it could also have cost him and his colleagues their lives.

It is not, of course, entirely new for children to have a role in warfare: medieval knights were served by pages and esquires undergoing their own introduction to the manly world of warfare; the ships of Nelson’s navy included boys in their complement; and drummer boys were an established part of most European Armies of the 18th and 19th Centuries. Youngsters significantly below conscription age managed to join up in the First World War and the *Hitler Jugend* was armed towards the end of the Second. But these youngsters have either played a peripheral and ancillary role – spared actual combat, and their deliberate targeting frowned upon – or they have been an occasional oddity (the Virginia Military Institute cadets at Newmarket or the boys of the military college at Chapultepec, for example). We must also recognise different understandings of childhood/adulthood in previous eras as indeed we must note ethno-cultural differences when casting moral accusations today. The issue today, though, (even accounting for differing cultural interpretations of majority) is one of widespread and systematic drawing into conflict of children far too young to understand their actions in anything but the most basic ways. Wars in Africa, especially but not exclusively, have been marked by the massive rise in deliberate use of child soldiers.

HRW estimate that there are more than 300,000 children being used as soldiers in more than 30 ongoing conflicts.¹⁶² They are recruited because they are innocent, impressionable and easily manipulated by threats of violence. In the circumstances persisting in many failed or failing states, where extremes of poverty are the norm,

where family and social structures have collapsed and violence is widespread, children are easy-pickings for militias and warlords in particular (though in some cases they are used by government forces, too). Herfried Münkler argues that ‘the combination of structural unemployment and the disproportionately high representation of young people in the total population who are largely excluded from the peace economy’¹⁶³ is a key driver in new wars.

(E)xclusion from regular economic activity, their hunger and their lack of peacetime social prospects automatically drive them into the arms of the warring parties. Under these conditions war represents not only an opportunity to secure their physical survival, but also a way of achieving social recognition that would never be accorded them if they did not have a gun in their hand.¹⁶⁴

It should not really come as a surprise then, that few if any of these young fighters seek or welcome an end to hostilities or their own ‘rescue’ from them. First hand experience of child soldiers in Sierra Leone led Major Jim Gray to conclude that it was a mistake to assume that they were eager to return home. On the contrary he never encountered one who wanted to do so.¹⁶⁵ Membership of armed gangs provides for basic needs but also offers status and social belonging. Beyond that the warlords have developed effective means of isolation to ensure return to their communities is all but impossible for the child soldiers:

Fighting groups have developed brutal and sophisticated techniques to separate and isolate children from their communities. Children are often terrorized into obedience, consistently made to fear for their lives and well-being. They quickly recognize that absolute obedience is the only means to ensure survival. Sometimes they are compelled to participate in the killing of other children or family members, because it is understood by these groups that there is “no way back home” for children after they have committed such crimes.¹⁶⁶

There is also the conduct of these child soldiers themselves to consider. Many are below the age of criminal responsibility recognised by most Western societies; they have been severed from family or community values and have had little education or moral upbringing. Alternatively, considering those trained in the Taliban *madrasas* of Pakistan and Afghanistan, they may have had an education that we would recognise as ideological brain-washing, instilling in them a morality that we find not only entirely alien but profoundly evil. In either case, their ethic set becomes the distorted and often barbarically cruel code of violence of their new ‘families’ with expectations (indeed,

demands) of atrocity, backed-up by fear of punishment for failure to comply. In many cases this may be further fuelled by the use of alcohol and hard drugs. Michael Ignatieff highlights the particular atrocities associated with adolescent irregulars:

In most traditional societies honour is associated with restraint and virility with disciplineThe particular savagery of war in the 1990s taps into another view of male identity – the wild sexuality of the adolescent male. Adolescents are supplying armies with a different kind of soldier – one for whom a weapon is not a thing to be respected or treated with ritual correctness but instead has an explicit phallic dimension. To traverse a checkpoint in Bosnia where adolescent boys in dark glasses and tight-fitting combat khakis wield AK-47s is to enter a zone of toxic testosterone. War has always had its sexual dimension – a soldier's uniform is no guarantee of good conduct – but when a war is conducted by adolescent irregulars, sexual savagery becomes one of its regular weapons.¹⁶⁷

Child soldiers are combatants and therefore under the simplest understanding of the *jus in bello* tenets of discrimination and proportionality can expect to be dealt with as such. Even when we accept that they are not in any real sense *willing* combatants, the law of double effect places them firmly in harms way (as in many cases does the simple right of self defence). Nevertheless, as we saw from the testimony of Trooper Boon, above (see p311), and to which Major Jim Gray¹⁶⁸ also adds personal experience, killing children, is abhorrent to most regular soldiers and will leave them psychologically scarred; it is alien to their sense of honour: there is nothing heroic in shooting a child however he – or she – is armed; their sense of self-worth is irreparably damaged by the encounter. Moreover, as Michael Skerker¹⁶⁹ has argued, in asymmetric warfare the law of double effect is of dubious value; negative publicity and international condemnation, which the asymmetric opponent actively seeks to bring upon us, must inevitably undermine the regular's will. The West's future thinking about war, its doctrine, its tactics and the preparation of its people will have to take account of this issue.

4.5 Summary

As with issues of *jus ad bellum*, the last one hundred or so years have seen an increasing codification of issues once the realm of moral judgement and matters of honour and professional conduct. The just war requirements of proportionality and discrimination, and the concepts embedded in chivalric codes, have been subsumed into a substantial

body of IHL. More recently still a new area of international law – human rights law – has also started to impact on military conduct, though it has been argued here that this has had rather less substantial impact than many politicians and media commentators have claimed. What has become clear, however, is that the increasingly complex character of contemporary conflict, with traditional boundaries and distinctions blurred either by circumstance or through deliberate intent of some of the protagonists, is rather less amenable to clear cut legislation than has been warfare in the past. IHL/LOAC, human rights law, the laws of occupation, or the domestic law of a soldier's own nation or the nation in which he finds himself operating, may all make demands of his conduct at different times or even concurrently. The principal conclusion to be drawn from the arguments of this chapter is that a soldier instinctively versed in sound moral principles offered by just war doctrine, will be better able to make the 'good faith' judgements that would stand him safe with any reasonable jury.

Although much of the focus of contemporary debate about conduct in war has been with the trends imposed by the preferred ways of the west's potential enemies, this chapter has argued that the west's preferred way of making war, also poses challenges for *jus in bello*. The value of the term 'asymmetric' has been questioned throughout this chapter, though its entry into both common parlance and the expert lexicon is recognised. Nevertheless, the asymmetries sought by the Western way of warfare must also be considered. The democratic peace thesis can be understood as an extrapolation of the aversion of Western democracies to fighting 'symmetric' wars; the extreme costs – in money and lives – of a major conflict between broadly equally matched powers had been all too fully demonstrated by the First World War. The driving force has been to seek war on terms that minimise risk and cost. This has had particular impact both on the occasion and conduct of interventions and has led to a reliance on technology, through which has been sought a significantly advantageous asymmetry.

Risk aversion can limit willingness to intervene or restrict intervention to non-military and often non-decisive means; it can promote a perception of selective intervention that undermines claims to moral universality; it can lead to conduct that transfers risk to the population at large – often those whose 'rescue' is providing the *jus ad bellum* for the

intervention in the first place; and it can result in an inadequate commitment of manpower that in turn impacts on the conduct of operations.

The desire to minimise both cost and the risk of casualties to one's own side, is an entirely natural, laudable and morally sound one. However, just war limits this with a requirement that the risk transferred to non-combatants be proportionate to the military objective sought (the so-called doctrine of double effect). In humanitarian intervention operations, when rescue of the civilian populations, or a section of it, is the basis of the *jus ad bellum* a different mindset is required, more akin to that of the policeman than that of the conventional warrior. Moreover, the concept of 'enemy non-combatant', that allows us to avail ourselves of the doctrine of double effect is of dubious if any value in many contemporary conflicts; not just in interventions and peacekeeping but in war against non-state entities, for example. Yet at the same time, a growth in risk aversion has led to a tendency in the west to prefer means of warfare, based on technological superiority, that can limit both proportionality and discrimination.

To this can be added a concern that the drive to reduce risks to our own troops leads to a reliance on technologies that allow us to lesser or greater degree to remove the soldier from the battlefield all together. As such he becomes no longer a warrior but rather a technician. Not only does distance complicate discrimination (despite the claims for the 'precision' of much modern weaponry, which can, of course, also hit 'precisely' an inappropriate target) but, most concerning of all, the moral agent, and most effective instrument of compassion is also removed from the battlefield. Gone is the opportunity for individual moral judgement of an enemy's continued capacity to pose a threat, and in its place, fuelled by the 'video-game' culture, is a desire to eliminate all hostile targets – no longer people but rather 'hot spots' on a screen.

In response to the west's technological superiority its actual and potential enemies have adopted a style of warfare seeking asymmetries of their own. Most typically this seeks to avoid direct confrontation with the west's superior military force and to attack, instead, soft – and usually civilian – targets; undermining will by destroying the civil population's sense of security and faith in its government.

In responding to the West's technological superiority, its opponents have largely resorted to a form of asymmetric warfare that presents greater moral challenges to regular military forces so engaged, than does conventional warfare. It brings them into greater contact with the 'neutral' civilian population (which may or may not be in sympathy with their asymmetric opponent's cause, but will almost certainly be both targeted by the opponent and used by him as a shield). It also brings them onto contact with a wider range of protagonists, who may present a challenge to the tradition of warrior's honour that underpins regular military ethos. They are likely to face an opponent unbound either by law, convention or ethics. They may be frustrated by an inability directly to engage with the enemy, and they are likely to encounter atrocity and attempts to provoke over-reaction. Yet, understanding that all warfare is at essence a political activity, it is more important than ever that their conduct be correct. Proper engagement with the 'neutral' population is likely to be as essential to strategic success as it is to legitimacy. Improper conduct, whether abuse of prisoners and civilians, or disproportionate and indiscriminate offensive action, undermines international standing and a country's 'soft power'; it creates friction in coalitions and damages an Army's standing with its own population. Soldiers' own sense of professionalism and moral standing is undermined by inhumane conduct on the part of their colleagues or themselves.

There are, at essence, two separate cases of illegitimate conduct to consider: on the one hand improper behaviour by individuals or groups of soldiers who act contrary to the laws of war and traditional codes of honourable military conduct, most particularly in relation to their treatment of civilians, prisoners or the wounded; and, on the other hand, what might be termed over-zealous prosecution of the conflict: breaches of *jus in bello* tenets of proportionality and discrimination. The first is relatively easy to deal with: it is wrong, we recognise it as wrong and, whilst acknowledging that we will never entirely eliminate it, we have the mechanisms for dealing with it and know what is required to reduce it still further. The second case is more difficult. Media comment in relation to the conflict in Iraq, in particular, has suggested that the changing face of Human Rights Law and its increasing encroachment on areas erstwhile the preserve of

IHL, have extended soldiers' culpability for their actions in tactical situations too far. It has been suggested here, though without detailed argument, that closer scrutiny of developments in international law rebuffs this view. In considering the other area of restriction placed on soldiers' actions in asymmetric as in other forms of conflict – that of RoE – we have seen that RoE, a political restraint as much as a guide to law, must also be seen as evidence of political will, a resource that governments must be prepared to commit if they wish successfully to employ armed force. Above all there is a need fully to recognise that asymmetric warfare is, first and foremost *warfare*; RoE, must reflect this. In cases of complexity, soldiers are best guided by an ingrained and instinctive understanding of the key tenets of *jus in bello*: proportionality and discrimination.

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CHAPTER 5: CONCLUSION

The central theme of this thesis, and its firm conclusion, is that just war remains robustly relevant today. A changed geo-political environment has left the legal paradigm for use of force an inadequate guide, yet there remains a clear requirement for even the most powerful nations to justify their uses of force if they are to retain moral standing and legitimacy of leadership. At the lowest levels, fighting men and women are faced with enormous and complex challenges resulting from the particular characteristics of modern warfare. Simple legal rules – as they are for policy makers – are either too restrictive or ill-suited for the confused circumstances that daily confront soldiers in modern war. Just war doctrine offers a framework for debate to shape the *jus ad bellum* decisions of policy makers; and its *jus in bello* principles provide the foundation for the moral intuition that must today be a fundamental part of every soldier's training: allowing instinctive, first-principles judgement to cut through the complexity and show the path to right action.

From a theoretical perspective, it has been argued here that just war should have appeal to each of the three broad schools of thought that influence modern policy makers. Realism outwardly eschews moral argument from issues of international relations in general and war in particular; the concept of 'national interest' instead is supposed to provide the sole underpinning of policy guidance. However, the absolute realism illustrated in the Melian Dialogue is likely to build resentment and provoke challenge; a more measured approach to use of force – for which just war offers sound guidance – might be expected to preserve a hegemon's authority by minimising challenge. In terms of conduct in war, as description realism is disproved in fact; as prescription it fails to take into account the importance that must be attached – as proved empirically throughout history – to a state's moral standing. Moreover, restraint in conduct and adherence to widely acknowledged rules can be seen as sensible insurance for a powerful country against the day when power has shifted. If nothing else the realist/moral-sceptic must recognise the prudential argument for restricting both the occasion of and conduct within war. Just war can offer the framework of guidance for this.

Although a broad church, liberalism *per se* is not opposed to the use of force; indeed certain strands within it may prove more prone to using force than are realists. If at one end of its spectrum it encompasses or at least tends towards pacifism, which would condemn just war for seeking to vindicate the unacceptable, at the other end it displays a tendency to moral-crusading in its interventionism. Here just war might offer the very framework for debate that is required to avoid hubris and unrestrained use of force to impose values assumed to be universal.

Just war has a natural appeal to International Society, which accepts the inevitability of war but seeks to minimise both its incidence and effect. The society of states depends for its existence on a minimum set of shared principles to which members feel able to subscribe; these must have broad appeal. The occasion on which armed force may legitimately be used, and the ways in which it may be used, are surely significant enough to be strong contenders for inclusion in this rule-set.

A repeated theme throughout the historical development of just war, both in the religious formulation of Aquinas and the legal codification of Grotius, is that the right to resort to armed force rests on the absence of a higher authority to which disputes can be referred for resolution. In this can be seen the basis for a belief that war could be eradicated should an enforceable system of international law be emplaced. The 'natural' law that governs the relations between states can be seen to include the provisions of just war doctrine but Vattel argues that it must be supported by a 'voluntary' law – essentially a codification of its principles in practice – to provide the objective standards against which states agree to be judged. Thus, in theory, with the development of international law to its apogee with the all but universal accession of states to the UN Charter regime, just war, as an element of natural law, had done its job and been rendered redundant. However, the UN Charter, by privileging order above all other values, incorporated in its foundation the seeds for of later discontent and challenge. The model was flawed from the outset because of the veto. Although it is clear that without the veto there could have been no UN, it has since its inception been used by the P5 in ways unintended by the founders. Practical limitations have further undermined the effectiveness of the paradigm. The failure of states to realise the

intended enforcement mechanisms left the UN impotent and the domestic law analogy unfulfilled. States' behaviour has indicated a lack of faith in the institutions established for peaceful dispute resolution and a tendency to abide by the norm of non-intervention only so long as it suits them. Most importantly the Charter was predicated on a value-set that placed order – as the *sine qua non* of international peace and security – above all else. By the end of the Twentieth Century this was widely questioned and a revised value-set has emerged that – in words at least – places individual rights and justice in prime position.

Despite the failure of the legal paradigm, there remains a requirement that states justify their resort to force and constrain their conduct within armed conflict. At the international level *jus ad bellum* and *jus in bello* are required as underpinnings of a state's moral standing in the world, which is a determinant of its leadership and influence, encapsulated in the concept of 'soft power'. Even the most powerful state has been shown to require – politically and practically – the support of allies, which is undermined if the occasion or conduct of its uses of force are perceived to be wrong. In democracies, especially, improper use of force threatens electoral support, undermines the standing of the ruling party and its leaders and can even threaten the standing of the institutions of the state, including the armed forces. Engagement in conflicts not widely perceived as just – or a reputation tarnished by improper conduct – will impact on armed forces' ability to recruit and retain soldiers. Lack of popular support for a conflict erodes national will and the readiness to accept the inevitable casualty-toll. Individually, those who must engage in combat on behalf of their nations run the risk of reduced morale if they are unconvinced by the cause, or if they are aware of inhumane conduct by their colleagues and allies. Although there is little evidence to support belief in cause as a major motivational factor for most soldiers, there is rather more to suggest that a lack of belief in cause is a serious addition to 'friction', which has negative impact on morale, cohesion and military effectiveness. If justification matters and legal justification has been found ineffective, then we must resort to first principles and have available the framework for moral debate. Just war provides exactly that.

Although predicting future war is a fraught business and history is littered with examples of its failure, we have only the past to guide and if we are to prepare for future

conflict we must be prepared to make some judgement as to the form it might take. The experience of history tells us that the nature of warfare is enduring – in particular it has remained, at essence, a human business at the centre of which is the use, actual or threatened, of violence to impose one side's will upon the other. The character of war, though, evolves to reflect its time. A particular characteristic identifiable today is that of increasing complexity as traditional boundaries are blurred and eroded. Security is no longer perceived to rest solely upon territorial defence and a paradigm that placed order above all else has been challenged by a reordering of values in favour of individual, not states', rights. Thus has emerged a greater tendency to interventionism on grounds of our own security or to promote values we argue are universal. To this can be added an argument that non-traditional threats, especially from non-state entities, and of weapons of enormous destructive power, have challenged our traditional understanding of last resort. Just war has a significant contribution to make in addressing both of these issues.

If the legal paradigm has been found wanting in a geo-strategic environment that promotes interventionism, and yet we are to avoid unfettered military interventions, then we need a new guide to frame our decision making. The tenets of *jus ad bellum* provide a sound framework for debate, albeit with some adaptation of traditional understanding. The subjective nature of just cause and the tendency for any aggressor to claim it, require a greater focus on the other criteria. In particular, right intent is easier objectively to verify. Whilst proper authority, in the sense of an effective supra-national body, has proved impractical in a legal sense, when interpreted as broad-based, cross-cultural international support, then it continues to play a critical role in justifying military intervention.

A right to anticipatory action today, as ever, increases insecurity and gives rise to a vicious circle of claims to necessary pre-emption. Just war tenets of last resort and proportionality of response rightly circumscribe anticipatory war – denying preventive war and constraining pre-emption. Neither terrorism nor WMD, as aspects of contemporary security threats, change the case. They may impact our understanding of immediacy – an attack can be further off in time and space when it meets Webster's

criterion of imminence – but they make no case for preventive action. A significant concern today must be that reasonable arguments for pre-emption are being used to justify preventive war, falling substantially short of last resort. Nations will always take their own counsel, regardless of international legal opinion, when it comes to promoting their own security. This may lead to the taking of anticipatory military action without prior authorisation or approval either in a formal sense from the UN or informally from the international community. Nevertheless, retrospective justification will be required to satisfy both domestic and international opinion. Adherence to the principles set out in the UN Secretary General's High Level Panel, themselves firmly founded in the just war tradition, offers sound guidance.

We must be alert, also, to the challenges posed by the characteristics of contemporary conflict to our traditional understanding of *jus in bello*. A professional code of ethics – the warrior's honour – is a key aspect of the ethos of Western military forces but it is based on an expectation of fighting a similar enemy. The 'asymmetry' favoured by the West's opponents is one that seeks to avoid direct confrontation with technologically superior forces, targeting instead the vulnerable civilian population, provoking over-reaction through well-publicised atrocity and increasing the decision-making complexity for regular armed forces by blurring and eroding traditional boundaries. From the conclusion of the Thirty Years War the conduct of warfare in the West sought increasingly to spare the civil population from the privations of war to the greatest extent possible – until the trend was reversed by the total wars of the Twentieth Century. Contemporary conflict, though, more resembles that of the pre-Westphalian age: many protagonists seek deliberately to engage directly or at least involve the civilian population. To this we might add that today's soldiers find themselves on a battlefield alongside or up against a range of new – or in many cases re-emergent – protagonists who will provide a challenge to their ethos. Particular challenging to modern Western soldiers will be to find themselves pitted against well-armed children, with little or no concept of a moral code and, indeed, possibly deliberately encouraged towards atrocity. Whilst such children must, of necessity, be treated as combatants even if acting without true volition, there are natural instincts to be overcome in engaging them and we must expect the effect on our soldiers to be a traumatic one. Western

armies, too, bring civilians to the battlefield; the trend for governments to outsource once core activity has not left the military immune. The admixture of these new protagonists further complicates the landscape of conflict. It is not a trend likely to be easily or quickly reversed so we must recognise it as a threat to the traditional values of the military, ensure that our soldiers are trained to expect it and recognise the importance of a firm and unshakeable understanding of, and belief in, their own ethic-set.

The complexities of modern conflict are not amenable to simple, easy-to-follow rules. Soldiers may find themselves at different times or in different places within the same conflict and within the same theatre, subject to different rules. Although RoE, as an expression of political will, should be suitable to the character of the conflict engaged in, they may sometimes themselves be complex, counter-intuitive and difficult to apply. In such circumstances soldiers are best guided by a deeply ingrained sense of what is morally right.

We must acknowledge that a natural – and perfectly laudable – desire to reduce own-force casualties has led to a ‘Western way of making war’ that may now have taken risk-aversion to the extent that just war tenets of proportionality and discrimination are jeopardised. In particular, in humanitarian interventions and complex emergencies the doctrine of double effect has questionable validity and a method of warfare so averse to own-force casualties that risk is transferred to the neutral civilian population, may not only challenge *jus in bello* but also undermine the *jus ad bellum*. Moreover, there is a risk that an illusory image of ‘clean’ war may seduce policy-makers into resorting more readily to use of armed force.

Soldiers are moral agents and potential instruments of compassion. As they are further removed from the battlefield moral distance is created, which not only challenges discrimination and proportionality but denies the opportunity for compassion. Worse, the tendency to dehumanise the enemy, reducing him to a hotspot on a screen or an icon on an electronic map, may create a greater readiness to kill – beyond the absolutely necessary; this will be exacerbated as soldiers are increasingly brought up with video

games that encourage an attitude of amorality towards killing. Only a deeply ingrained – to the point that it is intuitive – understanding of just war principles and the warrior code, can help us avoid this moral pit-fall. The tendency to dehumanise the enemy must be reversed. An absolute necessity in complex emergencies, humanitarian interventions and counter-insurgencies will be to reject the notion of ‘enemy non-combatants’ and to recognise the importance – for the preservation of our own moral well-being – of understanding the enemy (however different may be his culture, however heinous and unrestrained his actions) as human. Discrimination may be more difficult in complex warfare where boundaries are blurred – indeed many of our enemies wish it to be so; that simply makes it all the more important. Proportionality is the only way to retain international and domestic support and to have any hope of winning over a neutral population.

We must conclude, then, that just war continues to provide a valuable framework for debate to help guide policy makers in decisions of when to use force and the degree to which conduct of war must be restrained. While the legalist paradigm has failed adequately to cope with the challenges of the contemporary security environment, just war principles provide firm moral handrails to shape the necessary debates if the West’s use of force is properly to be justified. Furthermore, training and educating our soldiers in the principles of just war will better equip them for the challenging modern battlefield on which they will often have rapidly – indeed instinctively – to make life and death decisions in situations too complex for simplistic laws and rules of engagement always adequately to address.

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